

Profiling Culture: An Examination of Korean American Gangbangers in Southern California

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I. INTRODUCTION

Los Angeles Mayor James Hahn and Police Chief William Bratton have declared war on Southern California's street gangs.¹ The gang problem, they argue, is insidious and should be considered a national problem akin to terrorism.² The parallel between gangs and terrorism is instructive, for profiling is a controversial yet significant issue for both. While profiling and the war on gangs affect all gangs, the ramifications of both have largely focused only on African American and Hispanic gangs. Indeed, among the least studied type of gang is the Asian American gang in general and the Korean American gang in particular.³

According to one scholar, the dearth of scholarly literature on Asian American gangs is due to the fact that "Asian gangs are not perceived as a serious threat by the non-Asian community or media" because the majority of Asian American gang-related crimes are "committed against other Asians"; therefore, non-Asian American communities are rarely affected.⁴ Notably, there is even less literature on Korean American gangs.⁵ This is

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1. See Megan Garvey & Richard Winton, *City Declares War on Gangs*, L.A. TIMES, Dec. 4, 2002, at A1.

2. See Beth Shuster, *Hahn, Bratton Lobby for L.A. in Washington*, L.A. TIMES, Jan. 22, 2003, at B3.

3. See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, URBAN STREET GANG ENFORCEMENT 50-51 (1991) [hereinafter URBAN STREET GANG ENFORCEMENT]. According to this report:

[T]he cultural differences among gangs with ethnic ties to China, Korea, Laos, Vietnam, and other Asian countries are important and should be examined in depth. . . . Law enforcement agencies consider Asian gangs particularly difficult to investigate for other reasons that include language barriers, a lack of Asian investigators, a limited understanding of Asian cultures and Asian gang formation, a poor or distant relationship with Asian communities in general, and the mobility of Asian gang members across State and national lines.

Id.

4. See Steven Ho, *Mean Streets*, 9 TRANSPACIFIC, Mar. 1, 1994, at 38.

5. Perhaps the lack of scholarship on Asian American gangs in general and Korean American gangs in particular is due to the model minority stereotype. According to this stereotype, Asian

disconcerting given that “Asian and Pacific Island youth gangs” are extremely active, “particularly in Los Angeles,”⁶ and “Los Angeles is home to the largest concentration of Koreans outside of Korea.”⁷

This Comment attempts to fill this void,⁸ focusing specifically on profiling in the context of Korean American gangs. While this level of ethnic specificity may seem unwarranted, Korean American gangs actually differ from Asian American gangs, and differences between the “species” (i.e., ethnic groups within the category “Asian”) and “genus” (i.e., the general category “Asian” itself) compel this distinction.⁹ In other words, Asians are not one monolithic ethnic group; each Asian ethnic group possesses its own unique characteristics.¹⁰

Americans are the model minority because they have achieved success academically, professionally, economically, and socially. See, e.g., SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 167 (1991) (analyzing the model minority thesis); Pat K. Chew, *Asian Americans: The “Reticent” Minority and Their Paradoxes*, 36 WM. & MARY L. REV. 1, 9-11 (1994) (critiquing the model minority argument); Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 78 (1997) (arguing that the model minority myth divides “minority groups from each other” and “justifies the subordinated position of each of these groups”); Rhoda J. Yen, *Racial Stereotyping of Asians and Asian Americans and Its Effect on Criminal Justice: A Reflection on the Wayne Lo Case*, 7 ASIAN L.J. 1, 2-4 (2000) (presenting the historical factors involved in the creation of the model minority stereotype and advancing criticisms of the stereotype). As anecdotal support for this proposition, a seventeen-year-old gangbanger from the “Asian Boyz” asserted that “many white policemen are deceived by the common perception that all Asian [sic] are industrious and straight with the law.” Ho, *supra* note 4, at 43. He proceeded, “The white cops don’t know [expletive]. . . . They ask us if we’re in a gang and we say we’re students. And they let us go.” *Id.*

6. IRVING A. SPERGEL, *THE YOUTH GANG PROBLEM: A COMMUNITY APPROACH* 59 (1995).

7. Ho, *supra* note 4, at 39.

8. In addition, this Comment seeks to include within legal scholarship a distinctively Korean American narrative. See Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 10 (1994) (arguing that particular perspectives have been excluded from the current discourse on race and law, and proposing that the solution to this problem is to include “the narratives of the excluded”).

9. According to Angelo Ancheta:

The Asian American community comprises many communities. The Asian American experience comprises many experiences. As a population racialized as foreign outsiders, as immigrants, and even as “model minorities,” Asian Americans are lumped together as a homogeneous group. Racial categorizing, however, glosses over the extensive diversity within the Asian American population.

ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* 128 (1998). Likewise, “each ethnic group is different from the others, whether they be Chinese, Korean, Japanese, Vietnamese, or Filipino.” RANDALL G. SHELDEN ET AL., *YOUTH GANGS IN AMERICAN SOCIETY* 78, 80 (1997).

10. See Harvey Gee, Book Review, 11 SETON HALL CONST. L.J. 775, 777, 791-92 (2001) (reviewing *THE RACIAL AND CULTURAL PROFILING OF ASIAN AMERICANS: A REVIEW OF CONTEMPORARY ASIAN AMERICA* (Min Zhou & James V. Gatewood eds., 2000)).

Although racial profiling is problematic,¹¹ profiling based on race does not encapsulate the entire problem.¹² Nor is profiling theoretically restricted to the concept of race.¹³ Indeed, several legal scholars argue that “race does not matter and cannot matter in the changing society of the new millennium.”¹⁴ In lieu of race, scholars have argued that culture should play a significant role in society, which isn’t very surprising. The influx of diverse immigrants requires a shift, ethnically and culturally, from the Black/White dichotomy.¹⁵ In addition, the increasing scrutiny brought to bear on race can be countered with an emphasis on culture.¹⁶

Culture is the conceptual intersection between Korean American gangs and profiling. Cultural identity is beginning to become as important as, or exceed the importance of, racial identity.¹⁷ Yet academia has neglected to analyze this phenomenon.¹⁸

In response to the lack of scholarship, I advance three arguments. First, ethnic Korean culture influences Korean American gangbangers’ conduct. That conduct, of course, is manifested physically and is therefore visible. Law enforcement personnel may profile these gangbangers based on behavior that they believe is gang related, but, in reality, is simply ethnic cultural expression. Next, I analyze the constitutional puzzles inherent in this phenomenon. Specifically, and second, I argue that, in applying strict scrutiny, courts should consider the costs of *not* profiling on the Korean American community. Because most Korean American gang-

11. “[M]ost Americans, regardless of race, believe that racial profiling is a significant social problem.” DEBORAH RAMIREZ ET AL., U.S. DEP’T OF JUSTICE, A RESOURCE GUIDE ON RACIAL PROFILING DATA COLLECTION SYSTEMS: PROMISING PRACTICES AND LESSONS LEARNED 4 (2000); *contra* JAMES T. O’REILY, POLICE TRAFFIC STOPS AND RACIAL PROFILING: RESOLVING MANAGEMENT, LABOR AND CIVIL RIGHTS CONFLICTS 48 (2002) (“Racial profiling charges accuse the police of differentially selecting, aggressively searching and roughly handling the driver on the basis of the driver’s race. . . . Only a small number of police are the source of this hostile patterning.”); *Id.* at 51 (“The U.S. General Accounting Office was unable to find adequate support in the studies for statistically valid conclusions [regarding discriminatory tactics by the police].”).

12. Courts have established “increasingly limited guidelines for incorporating” the concept of race “into multiple programs.” Deborah Ramirez & Jana Rumminger, *Race, Culture, and the New Diversity in the New Millennium*, 31 CUMB. L. REV. 481, 491 (2001); *see also* Brandon Garrett, *Remediating Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 41, 60 (2001) (“While race may best define the problem, it cannot be isolated. Unfortunately, many police departments have tried to simply issue a policy barring officers from making stops ‘based solely on an individual’s race.’”) (citation omitted).

13. Gang clothing, tattoos, or demeanor, for example, may be profiled. *See* Susan L. Burrell, *Gang Evidence: Issues for Criminal Defense*, 30 SANTA CLARA L. REV. 739, 752 (1990); Suzin Kim, Note, *Gangs and Law Enforcement: The Necessity of Limiting the Use of Gang Profiles*, 5 B.U. PUB. INT. L.J. 265, 270-74 (1996).

14. Ramirez & Rumminger, *supra* note 12, at 493; *see also id.* at 482 (arguing that race is under increasing public and jurisprudential scrutiny, and that culture is more effective at “diversifying and strengthening American institutions”).

15. *See id.* at 482.

16. *See id.*

17. *Id.* at 501, 507.

18. *See* Robert J. Sampson & Janet L. Lauritsen, *Racial and Ethnic Disparities in Crime and Criminal Justice in the United States*, in 21 ETHNICITY, CRIME, AND IMMIGRATION: COMPARATIVE AND CROSS-NATIONAL PERSPECTIVES 332-33 (Michael Tonry ed., 1997); MILTON M. GORDON, HUMAN NATURE, CLASS, AND ETHNICITY 100-01 (1978).

related crimes are committed against Korean Americans, and because Korean Americans tend to under-report crimes committed against them, the practical costs of not reporting—victimization and perpetuation of violence—are significant and should be weighted within courts' analysis of "compelling interests" and "least restrictive means." Third, I argue that profiling culture should be constitutional under a Fourth Amendment analysis because the costs of not profiling lead to unique and severe harms, and because cultural acts practiced by Korean American gangmembers are particularized; and therefore, profiling does not broadly intrude on the affairs of the Korean American community at large.

Organizationally, Part II defines key terms. Part III analyzes several cultural conceptions, including ethnic Korean culture, American culture, Korean American culture, and *Zeitgeist*. Part IV assesses the concept of subculture, focusing specifically on the gang subculture. Part V evaluates the constitutionality of cultural classifications under the Equal Protection Clause and the Fourth Amendment. This part concludes by applying the concepts and arguments presented in the Comment to three major Fourth Amendment racial-profiling cases. Part VI, finally, offers concluding remarks.

As a preliminary matter, I should address two methodological points. First, one should conceptualize this Comment as an inductive analysis, establishing a general proposition from an examination of particular phenomena. Culture and subculture are intersecting concepts that are difficult to isolate in the formulation of independent and intermediate variables.¹⁹ Consequently, the conclusion I present as to whether ethnic Korean culture influences Korean American gangbangers' conduct should be recognized for what it is: a plausible hypothesis requiring, if possible, deductive evaluation.

Second, scholars or laypersons interested in studying gangs often confront another problem when conducting primary research: it is often difficult to speak candidly with a gangbanger to obtain information, for gangbangers generally do not trust "outsiders."²⁰ This problem posed no difficulty, however: I have grown up with, and many of my closest friends are, former Korean American gangbangers.

19. See SHELDEN ET AL., *supra* note 9, at 95 (describing the various influences—culture, underclass forces, and street requisites—on barrio youth behavior). There are additional methodological difficulties, including language and cultural barriers. See URBAN STREET GANG ENFORCEMENT, *supra* note 3, at 54-55.

20 See Robert J. Bursik, Jr. & Harold G. Grasmick, *Defining and Researching Gangs*, in JODY MILLER ET AL., *THE MODERN GANG READER* 9 (2d ed. 2001) ("It takes a skilled ethnographer to overcome the initial hostility that is often inherent to interactions with gang members. . . . In addition to this inherent suspicion, many researchers have noted that gang members are notoriously unreliable informants."); Ho, *supra* note 4, at 39.

II. DEFINITIONS

Before proceeding, it is important to define key terms, which will necessarily increase the quality of any subsequent discussion or argumentation.

Street Gang. It is difficult to construct a definition of street gang.²¹ Definitions are either under- or over-inclusive.²² Often, scholars explicitly recognize and pontificate about the complexity of crafting a definition and then simply proceed without arriving at any type of resolution—seemingly satisfied with an “I’ll know it when I see it” approach.²³ This approach, however, is tautologous; that is, what you “see” is influenced by what you think. Therefore, what is identified as a gang or gangbanger may, after all, be influenced by a visceral, unexpressed definition.

It is important to note, however, that a precise definition—sufficient for any situation—is unascertainable because “definitions vary depending on the ultimate purpose of the authority creating the definition.”²⁴

The Los Angeles Police Department defines “street gang” as “a group of people who form an allegiance for a common purpose and engage in violent, unlawful, or criminal activity.”²⁵ This definition reflects the scholarly consensus, which defines “gang” as a “group with social, racial, or ethnic ties that acts to further a criminal purpose.”²⁶ This particular definition offers a compromise between two competing schools of thought: “One school views gangs as primarily social units, while the other considers a gang’s presumed criminal purpose as the organizing principle.”²⁷ The compromise definition suffices for our purposes. More comprehensive and specific definitions do exist, however. For example, according to the Bureau of Justice Assistance, definitions of “street gang” usually include most or all of the following elements:

Three or more individuals associate periodically as an ongoing criminal group or organization, whether loosely or tightly structured.

21. See SHELDEN ET AL., *supra* note 9, at 13-19; G. David Curry & Scott H. Decker, *Understanding and Responding to Gangs in an Emerging Gang Problem Context*, 31 VAL. U. L. REV. 523, 530 (1997); see also Jeffrey J. Mayer, *Individual Moral Responsibility and the Criminalization of Youth Gangs*, 28 WAKE FOREST L. REV. 943, 951 (1993) (“Prosecutors, legislators, columnists and academics uniformly side-step the definition of a ‘gang’ when proposing or devising anti-gang strategies.”).

22. “Some social scientists report that although fighting is a common activity, the most common activities of gangs are ‘the same as those of many adolescent friendship groups—partying, hanging around and getting high.’” Burrell, *supra* note 13, at 748-51; see also Mayer, *supra* note 21, at 965 (observing that the various definitions examined “are invariably overbroad,” and that these broad definitions are “likely to stigmatize young minority males and exacerbate street crime”).

23. Burrell, *supra* note 13, at 751; *contra* SHELDEN ET AL., *supra* note 9, at 18-19 (explaining the use of descriptors in defining “gang-related crime”).

24. Kim, *supra* note 13, at 266.

25. D. Cameron Beck, Jr., Note, *The Balance Between Fighting Street Gangs and Adhering to the Constitution in Southern California*, 1 RACE & ETHNIC ANC. L. DIG. 30, 30 (1995) (quoting the Los Angeles Police Department’s definition of “street gang”).

26. Mayer, *supra* note 21, at 951.

27. *Id.*

The group or organization has identifiable leaders, although the leader for one type of criminal activity may be different than the leader for another.

The group has a name or identifying symbol.

The organization's members, individually or collectively, currently engage in or have engaged in violent or other criminal activity that includes homicide, assault with a deadly weapon, aggravated battery and assault, arson, intimidation of witnesses and others, robbery, forcible rape, kidnapping, vandalism (graffiti), burglary and larceny, and drug trafficking. In most instances, gang crime involves violence, drugs, weapons, or a combination thereof.

The group frequently identifies with or claims control over specific territory (turf) in the community, wears distinctive dress and colors, and communicates through graffiti and hand signs, among other means.²⁸

Gangbanger. All gangbangers are gangmembers, but not all gangmembers are gangbangers. "Gangbangers commit illegal acts—from misdemeanors like writing on walls to felonies, including murder. Only a small [number] of gangmembers in Los Angeles are responsible for illegal gang activity."²⁹ A gangbanger, therefore, is a gangmember who actually commits illegal activity (i.e., "puts in work") because of, and for, the gang.

Ethnicity, Race, and Culture. It is methodologically important to understand these concepts in order to identify "specific factors that contribute to group differences."³⁰

Various definitions of ethnicity abound.³¹ Generally, "race" traditionally refers to skin pigmentation or color, whereas ethnicity refers to the countries from which a person's ancestors can be traced.³² Specifically,

[T]o constitute an ethnic group, a set of persons must satisfy three conditions: commonality of descent, commonality of continuous culture, and closure. The members of the set must understand themselves as descendants of members of an historical society They must share a common culture And the group must contain all, or nearly all, of the persons who . . . are taken to share the descent and culture definitive of the group.³³

In other words, an ethnic group shares a common culture; that is, being part of an ethnic group determines culture.³⁴ This is probably not surprising, for "[a]s members of an ethnic group interact with each other, ethnicity

28. URBAN STREET GANG ENFORCEMENT, *supra* note 3, at 30.

29. Gregory J. Boyle, *The Mythic Enemy*, L.A. TIMES, Dec. 15, 2002, at M1.

30. Hector Betancourt & Steven Regeser Lopez, *The Study of Culture, Ethnicity, and Race in American Psychology*, AM. PSYCHOLOGIST, June 1993, at 631.

31. See, e.g., GORDON, *supra* note 18, at 107 ("We shall refer to a group with a shared feeling of peoplehood as an 'ethnic group.'") (citation omitted).

32. Sampson & Lauritsen, *supra* note 18, at 313.

33. Thomas W. Pogge, *Groups Rights and Ethnicity*, in NOMOS XXXIX ETHNICITY AND GROUP RIGHTS 193-94 (Ian Shapiro & Will Kymlicka eds., 1997) (internal citations omitted).

34. See Betancourt & Lopez, *supra* note 30, at 631; discussion *infra* Part IV.

becomes a means by which culture is transmitted.”³⁵ But the mere possession of a cultural characteristic common to members of a particular ethnic group does not translate into membership in that group.³⁶

Race may be defined in several ways. Several scholars root the term in biology,³⁷ whereas others contend that it is socially constructed.³⁸ Resolving this debate is beyond the scope of this Comment; ethnicity, not race, is the pertinent concept here.³⁹

Culture. Like the previous concepts, culture is “troublingly vague and, at the same time, hotly contested, and law’s relation to culture is as complex, varied, and disputed as the concept itself.”⁴⁰ One definition states that culture “includes every object [a group] . . . make[s] . . . and everything they think and do.”⁴¹ Likewise, Asian American culture has been defined as “anything that Asian Americans are doing.”⁴² These definitions are unsatisfactory—they are, like certain definitions of “street crime,” circular and not amendable to social inquiry. “[P]rogress is [only] possible if . . . cultural research specifies what is meant by culture in terms that are amendable to measurement.”⁴³

One scholar has defined culture as “the set of attitudes, values, beliefs, and behavior shared by a group of people, communicated from one generation to the next via language or some other means of communication.”⁴⁴ This definition, while imperfect, is adequate. On the basis of this definition, there may be broad and narrow conceptions of

35. Betancourt & Lopez, *supra* note 30, at 631.

36. *See id.*

37. *See* James M. Jones, *Cultural Racism: The Intersection of Race and Culture in Intergroup Conflict*, in *CULTURAL DIVIDES: UNDERSTANDING AND OVERCOMING GROUP CONFLICT* 467 (Deborah A. Prentice & Dale T. Miller eds., 1999) [hereinafter *CULTURAL DIVIDES*].

38. *See* THOMAS C. HOLT, *THE PROBLEM OF RACE IN THE 21ST CENTURY* 12-13 (2000).

39. Several scholars argue that race and ethnicity should not be distinguished. They argue that both are constructed, and, as such, “[r]ace is something blacks have; ethnicity belongs to whites.” *See, e.g., id.* at 17, 55; George M. Fredrickson, *Models of American Ethnic Relations: A Historical Perspective*, in *CULTURAL DIVIDES, supra* note 37, at 23. This argument is not supported in the literature, however. *See* discussion *infra* Part IV.

40. Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* 1, 1 (Austin Sarat & Thomas R. Kearns eds., 1998). For a pithy overview of the academic study of culture, including scholars’ difficulty in defining and understanding culture, *see id.* at 2-5; *see also* HOLT, *supra* note 38, at 15 (“In our everyday practice—as distinct from academic discourse—we recognize culture in different cuisines, styles of dress, language styles, music, and even values, but defining culture is much more complicated—even for those who earn a living doing just that.”). Scholars also argue that culture is relative and mutable, not absolute. *See* HOLT, *supra* note 38, at 55.

41. K. ANTHONY APPIAH & AMY GUTMANN, *COLOR CONSCIOUS: THE POLITICAL MORALITY OF RACE* 83 (1996).

42. ERIC LIU, *THE ACCIDENTAL ASIAN: NOTES OF A NATIVE SPEAKER* 79 (1998).

43. Betancourt & Lopez, *supra* note 30, at 630.

44. DAVID MATSUMOTO, *CULTURE AND MODERN LIFE* 4-5 (1997); *see also* GORDON, *supra* note 18, at 116 (“Culture, in other words, is the way of life of a society, and if analyzed further is seen to consist of prescribed ways of behaving or norms of conduct, beliefs, values, and skills, along with the behavioral patterns and uniformities based on these categories.”); *but see* APPIAH & GUTMANN, *supra* note 41, at 88 (arguing that it is “doubtful” whether groups have common cultures); Sam Crane, Editorial, *Becoming Chinese*, L.A. TIMES, Jan. 12, 2003, at M6 (describing how Chinese cultural resources have helped him cope with his son’s illness).

culture.

In one sense, America, France, and Italy are all a part of Western culture because of certain behavioral values shared by Americans, Frenchmen, and Italians as the result of their common social heritage of European life—values which they do not share with peoples of Oriental or African cultural background.⁴⁵

Korean culture, then, is not synonymous to Asian culture. Indeed, “Korean culture is no more identical with Chinese culture than U.S. culture is with that of England, France, or Germany.”⁴⁶ According to Donald MacDonald:

The Asian American community comprises many communities. The Asian American experience comprises many experiences. As a population racialized as foreign outsiders, as immigrants, and even as “model minorities,” Asian Americans are lumped together as a homogeneous group. Racial categorizing, however, glosses over the extensive diversity within the Asian American population.⁴⁷

Furthermore, the definition “attests to the continuity of culture over time and its continuing influence across generations.”⁴⁸

Left unaddressed in the definition is whether culture is necessarily rooted in biology or nationality. Textually, the answer seems to be no. The definition plainly states that communication is necessary. Anecdotally, too, the answer seems to be no.⁴⁹ A fifth-generation Korean American, for example, may be fully Westernized, unable to speak his or her ancestors’ language and ignorant of his or her ancestors’ beliefs and customs. The existence of such individuals indicates that culture transcends biology and nationality.⁵⁰

Ethnic or Racial Profiling. Ethnic or racial profiling is defined as “any police-initiated action that relies on the race, ethnicity, or national origin rather than the behavior of an individual or information that leads the police to a particular individual who has been identified as being, or having been engaged in criminal activity.”⁵¹ This definition distinguishes between

45. GORDON, *supra* note 18, at 117.

46. DONALD STONE MACDONALD, *THE KOREANS: CONTEMPORARY POLITICS AND SOCIETY* 11 (Donald N. Clark ed., 1996); *see also id.* at 68 (“Despite its thorough integration of Chinese culture over many centuries and despite the traumatic inroads of Japan and the West, Korea keeps its own distinct culture.”). The parenthetical raises an issue; namely, do Koreans actually possess a distinct culture? One Korean scholar cedes, “[W]e borrowed a lot from foreign cultures.” Chun Shin-yong, *Tradition and Modern Values*, in 9 *CUSTOMS AND MANNERS IN KOREA* 10 (Int’l Cultural Found. ed., 1982).

47. ANCHETA, *supra* note 9, at 128.

48. Jones, *supra* note 37, at 468.

49. *See Crane, supra* note 44, at M6.

50. *See generally* MATSUMOTO, *supra* note 44, at 5 (arguing that culture is not necessarily rooted in biology or nationality).

51. RAMIREZ ET AL., *supra* note 11, at 3; *see, e.g.*, Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 *UCLA L. REV.* 1075, 1081 (2001) (“A racial profile associates members of particular racial groups with particular crimes, based on a reasonable and genuine belief in actual statistical differences in crime rates or patterns of criminal involvement among groups.”); Ramirez & Rumming, *supra* note 12, at 494 (“Racial profiling occurs when police use race and racial stereotypes in determining who to stop, search, or charge for various

“acceptable” and “unacceptable” types of profiling. Reliance on race, ethnicity, and national origin constitutes racial profiling, which is controversial. Reliance on behavior, in contradistinction, does not constitute racial or ethnic profiling under this definition. The definition of culture employed in this Comment, however, explicitly includes a behavioral component. One principal issue then materializes: is profiling based on culturally influenced behavior constitutional?⁵²

III. CULTURAL CONCEPTIONS

Before proceeding, it is important to explain the following preliminary distinction: a person’s belief in whether characteristic *X* is cultural or not is not necessarily true; characteristic *X*, as a factual matter, may or may not be cultural.⁵³ We may label that person’s belief a stereotype or generalization and that stereotype or generalization may or may not be correct. Sometimes, the belief and the fact may not overlap, in which case the belief may be based on incorrect information.⁵⁴ Consequences will undoubtedly follow,⁵⁵ even when the belief is arguably positive.⁵⁶

The model minority stereotype is illustrative. According to this stereotype, Asian Americans are the model minority: they are hardworking, smart, and successful. These attributes are not common to all members of the category “Asian American”; the belief (i.e., the stereotype) and reality

criminal and traffic offenses.”). For a discussion of ethnic profiling in relation to September 11, see David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 974-77 (2002). For a discussion of racial profiling from an Asian American perspective, see FRANK H. WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* 190-200 (2002); Frank H. Wu, *The Profiling of Threat Versus the Threat of Profiling*, Address Sponsored by the *Michigan Journal of Race and Law* (Fall 2001).

52. See *infra* Part V.

53. See, e.g., O’REILLY, *supra* note 11, at 226 (reporting that certain persons believe that police officers approach minority drivers with “no understanding of how different the conduct of culturally divergent groups may appear” to them and stating that “[a]wareness of culturally ‘normal’ behavior in different groups is one aspect of the new cultural sensitivity”); Mayer, *supra* note 21, at 959 (“The relationship among the teenagers selling cocaine in Washington Heights were built, however, on the needs and benefits of the drug business and not any pre-existing social structure.”).

54. Banks asks us to:

[c]onsider the Wen Ho Lee case and assume that law enforcement officers stereotyped Chinese American scientists as more likely than scientists from other ethnic groups to work as spies. Such a stereotype might have embodied the view that Chinese Americans are, by nature, more traitorous than other groups, more inclined to betray their adopted homeland . . . [This stereotype] . . . implies something about the character and values [of] Chinese American scientists.

Banks, *supra* note 54, at 1098. Yet another example of stereotyping based on incorrect information is the *Time Magazine* article titled, “How to Tell Your Friends From the Japs,” which was published during World War II. See Chew, *supra* note 5, at 38. It stated, “[T]he Japanese [expression is] more positive, dogmatic, arrogant. . . . Japanese are hesitant, nervous in conversation, laugh loudly at the wrong time. Japanese walk stiffly erect, hard heeled. Chinese, more relaxed, have an easy gait, sometimes shuffle.” *Id.*

55. According to Randall Kennedy, “misinformation” may lead persons to act “reasonably to the perceived situation but unreasonably to the actual situation,” thereby leading to harmful consequences. See RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 144 (1997).

56. See Chew, *supra* note 5, at 39 (contending that the model minority myth embodies “negative stereotypes” that American society attributes to Asian Americans).

do not overlap perfectly. Asian Americans who do not fit this stereotype are nonetheless categorized as model minorities. As a result, their distinctiveness is lost, and society tends to overlook problems affecting them. After all, they are the model minority.

Yet this distinction presents a potential difficulty; namely, any attempt to state that *X* is a cultural characteristic may be responded to by the rejoinder, "You're stereotyping." One may argue this point theoretically, but should empirical data exist, we can anchor theory to reality. Accordingly, Thomas Sowell argues that ethnic groups share common cultural characteristics as a factual matter. Sowell observes:

One of the obstacles to understanding what behavioral characteristics follow each group around the world is the widespread use of the term "stereotype" to dismiss whatever observations or evidence may be cited as to distinguishing features of particular group behavior patterns. But behavior has consequences, and when these consequences are the same for the same groups in disparate settings, that is an empirical fact not to be waved aside. It is understandable that Russians might wish to explain away the remarkable success of German farmers in their midst by citing special dispensations granted the German emigrants by the czarist government. But when similar success is found repeatedly among German farmers in Australia, Mexico, Brazil, Honduras, the United States, Chile, and Paraguay, then that theory cannot bear the weight of that history. Similarly, to explain Chinese predominance in retailing in Jamaica by factors peculiar to Jamaica does not explain their predominance in retailing in numerous other societies on the opposite side of the planet.⁵⁷

In addition, as a logical matter, an individual's interpretation of an Asian American's cultural composition is not *necessarily* influenced by prejudice. Prejudice and incorrect information are distinct. Nevertheless, an interpretation of cultural composition may be harmful to Asian Americans.⁵⁸ One may non-prejudicially ask an Asian American, "So, where are you from?" This question, asked without any prejudice, may nonetheless cause its receiver to feel like an outsider, a foreigner, which may discourage him or her from feeling at home in this country. In that case, the effect is prejudicial, although the discriminatory intent is lacking. This situation, however, is different from one where intent exists. Consider the following hypothetical: suppose a company manufactures a costume that depicts Asians in a discriminatory manner. Now suppose only one of the following scenarios is true: (1) the company manufactured the costume

57. THOMAS SOWELL, RACE AND CULTURE: A WORLD VIEW 11 (1994).

58. See generally Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 296-97 (1997) (arguing that the elements that comprise the model minority stereotype may be seen as elements that comprise the "yellow peril" idea: "Hardworking and industrious becomes unfairly competitive; family-oriented becomes clannish; mysterious becomes dangerously inscrutable"); Yen, *supra* note 5, at 13-20 (arguing that the Yellow Peril stereotype has influenced jurors' views of reasonableness in the self-defense context, and has devalued the Asian American community).

because it is racist, or (2) the company did not know the costume would offend Asian Americans. The community's response would *most likely* vary depending on the scenario adopted, which demonstrates that prejudicial effect notwithstanding—that is, holding prejudicial effect constant—the existence or absence of discriminatory intent is determinative.

Of course, the community's response will not always vary with the presence of intent. A recent example makes this clear. In April of 2002, Abercrombie & Fitch released a new t-shirt depicting caricatured Asians. Soon thereafter, Asian Americans held a protest, despite the clothing retailer's claim that it did not intend to offend anyone. There were Asian Americans, however, who did not protest, for they felt the t-shirt was a sad, but not racist, attempt at humor. On the other hand, had Abercrombie & Fitch directly stated that it released the t-shirt to offend Asian Americans, one may reasonably conclude that even the most insouciant, non-protesting Asian American would have been pounding the pavement.

Therefore, establishing that interpretation occurs does not necessarily establish that prejudice is implicated. The two may be independent. The questions then become: do individuals interpret cultural characteristics, and how do they generally interpret them? That individuals interpret Asian cultural characteristics is an uncontroversial proposition.⁵⁹ In Section A, I will discuss how they interpret these characteristics.

A. Ethnic Korean Culture

Unlike the United States or the former Soviet Union, whose citizenry is extremely diverse, South Koreans are "culturally and biologically homogenous."⁶⁰ What is more, empirical evidence demonstrates that culture is persistent.⁶¹ Indeed, even individuals who consciously seek to renounce and eradicate the expression of their culture exhibit cultural characteristics unwittingly.⁶²

59. See generally Deborah A. Prentice & Dale T. Miller, *The Psychology of Cultural Contact*, in CULTURAL DIVIDES (stating that "people respond to ethnic groups in light of long-standing attitudes acquired through the socialization process"); GEORGE EATON SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 97-99 (5th ed. 1985) (explaining the existence of "cultural stereotypes" and presenting data regarding individuals' perception of minority groups' cultural characteristics); *id.* at 99-100 (underscoring the persistence of cultural stereotypes); Gee, *supra* note 10, at 780-89 (suggesting that Asian values are interpreted negatively by the media and stating that individuals possess "culturally embedded racial profiles"); see, e.g., Chew, *supra* note 5, at 42-43; Note, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926, 1931 (1993).

60. MACDONALD, *supra* note 46, at 9.

61. See, e.g., Simpson & Yinger, *supra* note 59, at 92 ("The things that are important about cultural norms, from our point of view, are their tendency to continue beyond the situation in which they appeared and their coercive power over individuals."); THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 133 (1984) ("People are not magically homogenized by crossing a national border."); SOWELL, *supra* note 57, at 1-4.

62. Sowell elaborates:

The question of distinctive behavioral traits, values, and ways of thinking is separable from

But culture can be diluted or eradicated.⁶³ Sucheng Chan describes the experience of second-generation Asian Americans who were ambivalent about, and felt disconnected to, their ethnic culture.⁶⁴ Even though this is possible in general, Koreans specifically feel an obligation to preserve their culture “by teaching it to their children, who accepted such tutelage more willingly than did their Chinese or Japanese peers.”⁶⁵ A “fierce nationalism” pervades the Korean self due to the “Japanese colonial masters” in Korea who “tried to wipe out Korean culture.”⁶⁶ According to Chun Shin-yong, “tradition . . . with its roots in the past, currently exerts its influence on our minds.”⁶⁷ In short, a homogeneous Korean culture seems to exist among Korean Americans.

The next issue is whether ethnic culture influences gang-related conduct or, stated differently, whether ethnic culture is expressed in the gang. According to Irving Spergel, cultural factors account for differences between Asian American gangs and non-Asian American gangs generally.⁶⁸ Sucheng Chan adds:

There is still a powerful allegiance to their Asian cultures and traditions. For example, the “Dai-Lo” [Chinese gang leader] or elders are undeniably given proper respect and complete power. Fighting hard for ethnic reputation and identity, spirited terms such as “Asian Pride,” “100% Vietnamese” and “Korean Pride” have become common [slogans] . . . among Asian gangsters who are proud of their heritage.⁶⁹

As anecdotal support, “Boxer,” a former gangbanger from the Southern California gang, “South Bay Korean Mob” (“SBKM”), offered the following responses to my interview questions:

Q: Was everybody in the gang a first-generation Korean American?

A: The majority were first-generation. But about fifteen percent were second- to third-generation.

Q: Were they treated differently?

A: They were made fun of, not in a humiliating manner or viewed upon as a lower rank, but ragging on them because some of them couldn’t speak the language or understand the jokes.

Q: Did they understand Korean culture?

A: Almost everybody did. Those who didn’t either learned quickly or were taught very effectively because the elders didn’t like that. So they

the question of self-conscious “identity” as a member of a particular ethnic group. One may repudiate one’s roots and still exhibit them unwittingly. The *conversos*, fifteenth-century Spanish converts to Christianity from Judaism, in many cases promoted anti-Semitic policies, but nevertheless worked in the same kinds of occupations and with the same kind of success as when they had been Jews.

SOWELL, *supra* note 57, at 28.

63. *See id.*

64. CHAN, *supra* note 5, at 115-16.

65. *Id.* at 116.

66. *Id.*

67. Chun Shin-yong, *supra* note 46, at 9.

68. *See* SPERGEL, *supra* note 6, at 138-40.

69. Ho, *supra* note 4, at 40.

were put in their place very fast.

Q: Did the gang practice Korean customs?

A: If you're talking about mannerisms like bowing or addressing elders, then yes.⁷⁰

This is not a uniquely Asian American phenomenon. One study indicated that culture influences how Mexican American gangbangers conduct themselves.⁷¹ This study noted that

the barrio gang provides an arena for age- and gender-role formations and for role enactment and self-empowerment . . . [G]ang initiation rights and fighting and drinking behaviors allow young males to prove their manhood (*machismo*). The gang also includes a "cholo front" . . . a set of role prescriptions that include certain clothing styles, nicknames, tattoos, speech patterns, styles of walking, and so on . . . The term *cholo* . . . reflects a unique "cultural transitional situation of Mexican-Americans in the southwestern United States" . . . It . . . involves many of the old customs of Mexican-Americans, including the adolescent *palomilla* tradition that "includes many daring and bravado male patterns, and an anti-authority attitude."⁷²

This analysis presents two conceptions of cultural expression. First, cultural expression may be ethnically ubiquitous, practiced generally by members who share in the ethnicity. Second, cultural expression may be ethnically based yet transformed through the filter of the gang and its unique subculture (i.e., "filtered culture").

1. Cultural behavior

Since culture is expressed behaviorally,⁷³ physical expression by gangbangers may be evaluated to discern whether culture influences, or is implicated in, the expression. Specifically, this Comment will concentrate on nonverbal communication.

Just as spoken languages differ from one culture to the next, so do unspoken, nonverbal behaviors. People of all cultures learn to use nonverbal behaviors—facial expressions, gestures, distance, gaze, and postures—as part of their communication repertoire, but people in each culture learn to use them in very specific ways. All humans are born with the capacity to form all types of sounds; culture dictates how we shape and mold those sounds into particular languages. In this same way, culture shapes and molds nonverbal behaviors into each culture's

70. Interview with "Boxer," formerly of the Korean American gang "South Bay Korean Mob," in Torrance, Cal., questions 9-12 (Jan. 17, 2003) [hereinafter Interview].

71. See SHELDEN ET AL., *supra* note 9, at 95.

72. *Id.*

73. See O'REILLY, *supra* note 11, at 226 (assuming that "loud talk" is cultural); SOWELL, *supra* note 57, at 10 ("Cultures involve attitudes as well as skills, languages, and customs. Attempts to measure cultural differences between groups by attitude surveys, however, miss the crucial point that culture is expressed in *behavior*, not lip service."); see also GORDON, *supra* note 18, at 115 (defining "culture" as including "the ways of acting and the ways of doing things which are passed down"—that is, as including physical expression).

nonverbal language.⁷⁴

In this vein, Margaret Russell has identified “clothing” as a “cultural identifier.”⁷⁵

Various scholars have identified Asian and ethnic Korean cultural nonverbal behavior that may be perceived as gang related to the non-Asian eye. Furthermore, behavior can carry disparate meanings to people from different cultures.⁷⁶ The court in *United States v. Montero-Camargo*⁷⁷ agreed, stating that:

such behavior is susceptible to different interpretations depending on one’s culture. In some cultures, to look directly at a person in a position of authority is deeply disrespectful; in others, *not* to look directly at that person gives rise to the impression that one is somehow dishonest.⁷⁸

Moreover, “[w]hen we interact with people who have different nonverbal languages, we often form negative impressions of them.”⁷⁹ Applying this line of reasoning, non-Koreans may perceive ethnic Korean cultural behavior differently from Koreans, and the perception may be the basis of a negative impression, and possibly profiling.⁸⁰

a. Respectful bowing

Respect is expressed in various ways, probably most notably in speaking⁸¹ and the act of bowing.⁸² Bowing is a physical gesture generally

74. MATSUMOTO, *supra* note 44, at 33.

75. Margaret M. Russell, *Entering Great America: Reflections on Race and the Convergence of Progressive Legal Theory and Practice*, 43 HASTINGS L.J. 749, 765 (1992).

76. “People from different cultures have their own rules for engaging in nonverbal behaviors. These rules may be quite different from the rules you or I may be fluent in. These rules may dictate that different behaviors are enacted to get certain points across or to accent a specific point.” MATSUMOTO, *supra* note 44, at 34.

77. 208 F.3d 1122 (9th Cir. 2000).

78. *Id.* at 1136 n.27.

79. Elaborating on the foregoing proposition, Matsumoto writes:

In the United States, we all learn to interact with people at a certain distance. When you interact with someone you do not know very well and this person places himself close enough to you so you feel his breath when he speaks, you will probably feel quite uncomfortable and try to adjust the distance. He will follow. You will adjust again. He will follow again. You will probably want to get out of that interaction as soon as possible. When you do, you will think that the person was rude or without manners.

MATSUMOTO, *supra* note 44, at 35.

80. Profiling based on “behavioral and contextual cues” does occur. *See, e.g.*, Heather MacDonald, *What Looks Like Profiling Might Just Be Good Policing*, L.A. TIMES, Jan. 19, 2003, at M3.

81. Because profiling usually does not occur with respect to speech, this Comment will focus on the act of bowing. Regarding speech, however, Boxer stated:

In Korean custom, you address your elder with respect by calling them big brother. When you have a big brother, whatever they say went. When caught being disrespectful, they would either yell at you, lecture, or if worst comes to worse, beat you. In general, a lot of the founders were lenient and fun to be around, but there were a few that abused it and scared the members into hiding or showing more respect.

Interview, *supra* note 70, at question 15.

82. *See generally* A HANDBOOK OF KOREA 239 (6th ed. 1987) (describing a Korean New Year’s Day custom, where young people pay respects to their elders by bowing to them); Choi Gil-sung, *Annual Ceremonies and Rituals*, in 9 CUSTOMS AND MANNERS IN KOREA, *supra* note 46, at 40 (describing the New Year’s Day ritual “Se-bae,” where the young “pay respect to their elders with a

performed when greeting or saying goodbye. As one might suspect, Korean American gangbangers bow frequently, as respect is such a powerful concept within Korean American gang life.

Moreover, the fact that Korean Americans are respectful is known by law enforcement: "Police find that Asian gangs . . . act with respect toward law enforcement."⁸³ That law enforcement officials possess knowledge of this cultural characteristic and its application in at least one policing context suggests they understand how respect is applied in other contexts, which include activity in the context of Korean American gang life.

Not surprisingly, respect is also a powerful cultural concept in Korean society.⁸⁴ "[M]ost social relationships are conceived in terms of hierarchical order between unequal pairs. The senior has responsibility for wise and benevolent direction of behavior, and for the welfare of those in his charge; the junior has the duty of respect and obedience."⁸⁵

Within Korean American gang life, respect is taken to the extreme because, among other reasons, the consequences for being "disrespectful" are swift and unpleasant. A mere look may provoke a violent response from an elder. The absence of appropriate deference in one's voice when speaking to an elder can lead to a scathing lecture or physical beating. Reputation, mentality, and behavior also likely play a part in the degree of respect given to gang elders by the younger members. The elders in a gang are ordinarily the "hardest" gangbangers. In other words, they are usually the best fighters, the most violent, the most committed to the gang. This being the case, young men in Korean American gangs act obsequiously. Their actions are almost sarcastic in how respectful they are. In the words of one gangbanger, "[W]e are brought up to be respectful. . . . I think it's kind of ironic, the way 'Koreanized' gangsters act. It's somewhat like they're the respectful or prideful gangsters."⁸⁶

Now consider a hypothetical. Suppose a group of young men are at an airport awaiting the arrival of an elder. The young men range from nineteen to twenty-seven years of age. The elder is twenty-nine-years-old. When the elder appears from the gate, the young men bow in unison. Suppose the young men and elder are gangbangers. The act of obeisance is an ethnic cultural act employed in the context of gang activity. That act is performed by non-gang-affiliated Korean Americans on a weekly if not daily basis. In this case, the cultural act is performed both by suspect and non-suspect persons. This case is analogous to the standard racial-profiling scenario: like the Korean American case, where bowing may be profiled even though it is practiced by both gangbangers and non-gangbangers,

formal bow on the floor").

83. SHELDEN ET AL., *supra* note 9, at 78.

84. See generally A HANDBOOK OF KOREA, *supra* note 82, at 237-40 (explaining the centrality of respect in Korean society and in the Korean family).

85. MACDONALD, *supra* note 46, at 69 (describing the notion of filial piety, where "respect of juniors for seniors is . . . very strong").

86. See Interview, *supra* note 70, at question 21.

African Americans may be profiled based on their skin color even though both innocent and guilty persons are African American. The evident distinction, however, is this: where the African American is profiled based on his skin color—which is a proxy for race—the Korean American is profiled based on the expression of his culture.

One may argue that the given analysis is confused. The arguments would proceed as follows: first, the Korean American is actually profiled based on his ethnicity since the cultural expression would be rendered nugatory if the person were not Korean. Second, the bowing per se is not determinative; instead, the bowing *and* the appearance of the youth are determinative.

Generally, both arguments are flawed for the same reason. In both arguments, the cultural expression *is* being profiled; the other components—ethnicity and appearance—while implicated, are not themselves what law enforcement potentially would profile. For example, simply being Korean would not be enough for one to suspect gang activity. Korean American gangbangers are extremely respectful and bow often, which is why the cultural act of bowing becomes an issue.

Specifically, the first argument's structure is logically unsound. The first premise states: if the actor is not Korean, then the cultural expression is meaningless. From this, the argument concludes: the actor is therefore profiled based on his ethnicity. Non sequitur. Additionally, the argument assumes that ethnicity and culture are inextricably bound, but the previous analysis of the definition of culture⁸⁷ revealed that culture may be external to ethnicity or race. Nevertheless, ethnicity is a variable. Holding ethnic Korean cultural expression constant, a person's ethnicity may influence that expression's meaning or force.

Cultural profiling, therefore, occurs on two levels: ethnicity and cultural expression. The two are necessary, but neither is sufficient; in other words, the cultural act triggers the profiling. As support for this proposition, imagine two individuals. Both are Korean, but one is an earlier-generation Korean American who expresses ethnic Korean cultural behavior while the second is a fifth-generation Korean American who knows and practices only Western cultural behavior. In this scenario, where ethnicity is held constant, the determinative factor is culture, which indicates that Korean Americans are not solely ethnically or racially profiled. In other words, ethnic or racial profiling does not adequately address the uniquely Korean American situation.

The second argument assumes that Korean American gangbangers dress in a particular style. While African American gangbangers can be said to dress in a particular style (e.g., many dress in red or blue to represent the Blood or Crip gang, respectively), dress generally has no such direct correlation or bearing on Korean American gangbangers. In SBKM,

87. *Supra* Part II.

for example, gangbangers' and gangmembers' attire ran the gamut, from baggy pants and beanies, to slacks and undershirts, to jeans and polo shirts. Simply put, there is no common denominator; Korean American gangbangers and non-gangbangers dress similarly,⁸⁸ which is actually quite unique.⁸⁹ Holding appearance constant, then, the bowing is itself determinative.

b. Posturing

In Korea, individuals involved in conflict-type scenarios often "engage in a high degree of melodrama and posturing of the hold-me-back-or-I'll-hit-him variety. . . . Given that media thrive on words and images, it is easy to assume that posturing is the real thing."⁹⁰ This posturing, however, is combined with an "extremely fine sense of etiquette,"⁹¹ which is a contradiction that "can be difficult for the more ordered Western mind to handle."⁹² Posturing refers to the manner in which Koreans "explode in anger," particularly with strangers.⁹³ This behavior is symptomatic of more general cultural phenomena. According to one scholar, "Koreans are only beginning to develop the democratic attitudes and institutions to resolve conflict. Hitherto it has been done by power. Hence the need to yell and make . . . demands."⁹⁴

Two anecdotes may illustrate this behavior and its ramifications for profiling. During our interview, Boxer told me about an incident that took place when he visited Korea several years ago. One night, while he was walking, another Korean youth bumped him while walking the other direction. Boxer understood that this type of bumping in the United States in general and within the gang subculture in particular indicates a desire to reflect "hardness," or toughness, and lack of reciprocation translates into weakness. As a result, Boxer turned around and yelled, "What's up!" The other youth continued walking. Boxer yelled even louder the second time, which caused the youth to turn around briefly, look, and walk away. Boxer relayed the story to his Korean friend who informed him that the type of bumping considered rude or gang related in the United States is accepted as the norm in Korea.⁹⁵ As one expert on Korea explains, "The hurrying people on the streets of Seoul appear to the foreign visitor to be rude in

88. See SHELDEN ET AL., *supra* note 9, at 124 (stating that even though police officials view attire as an "indication of deviance or as suggestive that such a person is criminal or potential criminal," many persons wearing such attire are not gangmembers and much "so-called gang attire is clothing worn by many adolescents all over the country, including millions of middle-class youths").

89. Interview, *supra* note 70, at question 20.

90. MICHAEL BREEN, *THE KOREANS: WHO THEY ARE, WHAT THEY WANT, WHERE THEIR FUTURE LIES* 4 (1998).

91. *Id.* at 6.

92. *Id.* at 7.

93. *Id.* at 35.

94. *Id.* at 36. Of course, not all Koreans or Korean Americans posture. The scholarly literature and anecdotal evidence support my conclusion that posturing occurs *generally*.

95. Interview, *supra* note 70, at question 34.

their pushing and shoving, as though others were inanimate objects."⁹⁶

Second, Michael Breen, a journalist who has extensively covered Korea, recounts a story of a confrontation after a car accident between a British motorist and a Korean in South Korea. The Korean leaped out of his car yelling angrily. He accosted the British person and grabbed his tie whereupon the British person hit him with his fist. The Korean was stunned. After all, they were only talking.⁹⁷

Now imagine a group of Korean American youths walking through a mall bumping into people, or imagine a Korean American youth "exploding" on a non-Korean youth. These expressions relate to gang-related activity. Korean American gangs seek to illustrate their pride and exert their strength via aggressive actions, which include bumping, shoving, and power plays. Thus, gang behavior and cultural expression overlap. In these cases, the suspect behavior is not an accurate indicator of gang-related or criminal behavior. Police may reasonably believe they are observing indicia of gang behavior without realizing that the indicia actually represents Korean cultural expression. Their interpretation is reasonable based on their perception, but may be unreasonable based on reality.

Yet Korean American gangbangers act this way more often and with more rigor because, consciously, they recognize the message their actions convey. And that message is integral within the context of the gang subculture. The degree to which they posture is therefore a point of distinction.

c. *Formal drinking customs*

Drinking is an activity through which culture in general and respect in particular are expressed.⁹⁸ "At . . . drinking parties, social order becomes an immediate question: who should greet whom first, who should sit where, who should sit down first, who should pour wine for whom first."⁹⁹ In Korea and Japan, for example, "drunkenness is not treated as a disease, whereas in China, which is under the strong Confucian tradition, and in such protestant countries as England, America and Switzerland, it is regarded as an abnormal behavior and a symptom of alcoholism."¹⁰⁰

The Korean drinking custom proceeds as follows: if an elder pours you a glass of alcohol, you must receive it by holding your cup with two hands. When you drink, you must turn your face and body away from the elder and drink it, usually in "one shot." If you pour an elder a drink, you must pour the bottle of alcohol with two hands.¹⁰¹

96. MACDONALD, *supra* note 46, at 78.

97. BREEN, *supra* note 90, at 36.

98. See A HANDBOOK OF KOREA, *supra* note 82, at 239.

99. *Id.*

100. Lee Boo-young, *Korean Culture and Mental Health: In Comparison with Western Culture*, in CUSTOMS AND MANNERS IN KOREA, *supra* note 46, at 25.

101. Interview, *supra* note 70, at question 17.

This custom is practiced by Korean American gangbangers. Boxer adds, "In Korean custom, if an elder asks you to drink, you're supposed to drink. This would lead to extreme intoxication, and we would drink until someone threw up. And we had no say in the matter. Whatever they say went."¹⁰² Moreover, when asked whether SBKM performed activities "that other gangs didn't," he replied, "Drinking at a younger age. . . . [W]e were basically forced to drink. . . ."¹⁰³ The evidence attests to the frequency and rigor with which Korean American gangmembers and gangbangers drink and practice drinking customs.

Cultural profiling is perhaps implicated in this case if a group of young men are observed in a cafe practicing drinking customs. Understanding that Korean American gangs frequent drinking establishments, and additionally understanding the premium placed on respect, law enforcement personnel may profile based on customary drinking actions undertaken in furtherance of respect.

d. Attire

As discussed earlier in the section about respectful bowing, a theoretically interesting question is whether culture is reflected in attire. As applied to this Comment, the argument might proceed as follows: "Arguably, dressing a particular way manifests a certain behavior."¹⁰⁴ Behavior, as was established previously, may be influenced by culture. "Gang profiles . . . focus primarily on physical attributes,"¹⁰⁵ including attire. Therefore, law enforcement may be culturally profiling in using gang profiles.¹⁰⁶

Although the scholarly literature attests to the existence of traditional cultural attire,¹⁰⁷ it does not support the proposition that "everyday" attire is influenced by Korean culture. Boxer supports this conclusion anecdotally:

102. *Id.*

103. *Id.* at question 14.

104. Kim, *supra* note 13, at 282.

105. *E.g., id.*; Beck, *supra* note 25, 33-34; Ronald Weitzer, *Racialized Policing: Residents' Perceptions in Three Neighborhoods*, 34 LAW & SOC'Y REV. 129, 139-40 (2000); see also James A. Maloney, *Constitutional Problems Surrounding the Implementation of "Anti-Gang" Regulations in the Public Schools*, 75 MARQ. L. REV. 179, 183-91 (1991) (analyzing the "anti-gang" regulation of student attire and hairstyle); Russell, *supra* note 75, 759-61 (describing an incident in which police officers suspected young men of being gangmembers based on their appearance and responses to the officers' questions).

106. One scholar has already argued that profiling based on attire is racial profiling:

One's appearance can also influence police perceptions: "ghetto" or "gangster" clothes and expensive jewelry may be taken by police as signs of suspiciousness or criminality. Insofar as attire, language, and gestures are cues of troublesome or potentially dangerous persons . . . police may treat such persons harshly or unfairly. There may be a sense in which police generalizations about "attire, the image you present, the way you speak" is, as a young Cloverdale woman believed, a function of "mostly just classism, not racism," but research suggests that police tend to view such things through a racial prism—defined differently depending on a person's race.

Weitzer, *supra* note 105, at 139-40.

107. For photographs of traditional Korean attire, see A HANDBOOK OF KOREA, *supra* note 82, at 235-36.

“Unless we were attending night functions, we dressed very casually. I guess you could say the way we dressed was very casual. We wore sneakers, jeans, khakis or shorts, t-shirts, caps, whatever.” Therefore, this analytical route seems unavailing.

2. *A rejoinder*

This ethnic cultural argument is not without its difficulties. Consider the following rejoinder. Gangs, especially Korean American gangs, conglomerate based on ethnicity or race, which is then the prominent physical attribute of the gang. Indeed, “[b]ecause gangs frequently organize along ethnic lines (that is, by racial, national, linguistic, and cultural background), most agencies classify gangs initially by ethnicity.”¹⁰⁸ According to Boxer, only Koreans were represented in SBKM.¹⁰⁹ When asked whether non-Koreans could join, he responded:

They probably could’ve, but they wouldn’t have been treated equally. They would’ve been used for lesser work. . . . Actually, they tried to incorporate non-Koreans as a front—a smoke screen—so that the focus would be put more on them in terms of drug sales, extortion. But that all fell apart.¹¹⁰

Perhaps, then, ethnicity serves as the basis under which cultural expression is given content and import.¹¹¹ For example, “law enforcement agencies assert that particularized ‘gang identifiers’ form the basis for their selection of individuals and groups. Interestingly, however, these ‘gang identifiers’ are conceptualized and developed specifically along racial and ethnic lines.”¹¹² In fact, research suggests that “police tend to view [attire, the image one presents, and the way one speaks] . . . through a racial prism—defined differently depending on a person’s race.”¹¹³ As a result, there is no distinction between ethnicity and culture, and the former is in actuality being profiled.¹¹⁴

108. URBAN STREET GANG ENFORCEMENT, *supra* note 3, at 50; *see also* Mayer, *supra* note 21, at 963 (“Similarly, New York appears to host several competing criminal organizations involving Chinese-Americans. Gangs such as the ‘Green Dragons,’ the ‘Ghost Shadows,’ and the ‘Flying Dragons’ have their own traditions and are organized along ethnic lines.”).

109. Interview, *supra* note 70, at question 2.

110. *Id.* at question 6.

111. The Court in *United States v. Weaver* echoed this notion:

Facts are not to be ignored simply because they may be unpleasant—and the unpleasant fact in this case is that [the DEA agent] had knowledge, based upon his own experience and upon the intelligence reports he had received from the Los Angeles authorities, that young male members of the black Los Angeles gangs were flooding the Kansas City area with cocaine. To that extent, then, race, when coupled with the other factors [the agent] relied upon, was a factor in the decision to approach and ultimately detain [the suspect].

966 F.2d 391, 394 (8th Cir. 1992) (emphasis added), *cert. denied*, 506 U.S. 1040 (1992).

112. Russell, *supra* note 75, at 765.

113. Weitzer, *supra* note 105, at 140.

114. Relatedly, the idea of unconscious profiling supports the view that ethnicity and race, not culture, will invariably be profiled. *See* Russell, *supra* note 75, at 766; *see also* Beck, *supra* note 25, at 35 (“Race is certainly an unstated or subconscious characteristic of the profile.”).

Although this argument is quite natural,¹¹⁵ it is ultimately unavailing for the reasons previously stated.¹¹⁶

B. American Culture

Perhaps Korean Americans adopt "American" culture and, as a result, do not behaviorally express ethnic Korean culture. There are two issues requiring resolution. First, what is American culture? Second, does acculturation occur where indigenous cultural expression is replaced by the cultural expression of the United States?

Unlike South Korea, the United States consists of heterogeneous communities, which is the basis for the proposition: there is no common American national culture.¹¹⁷ Specifically, there is no expression that is derived "from beliefs and values and practices (almost) universally shared and known to be so."¹¹⁸

Regarding the second issue, "[s]tudy after study demonstrates . . . that the vast majority of immigrants take on cultural traits of the host community. Some traits are taken in exchange for, but most are taken in addition to, old ones."¹¹⁹ There is considerable scholarly consensus on this issue.¹²⁰ In fact, the State of California commissioned a study to explore how it could increase participation and assimilation among immigrant communities,¹²¹ which demonstrates that immigrants retain their ethnic cultural values. Therefore, one cannot rebut the cultural profiling argument based on the assertion that Korean American gangbangers are actually expressing uniquely American culture.

C. Korean American Culture

Like "American culture" in the immediately preceding analysis, the term "Korean American" requires exposition. The literature treats "Korean American" as a subset of "Asian American."¹²² Therefore, evaluation of the latter will clarify the meaning of the former.

115. Prentice & Miller, *supra* note 59, at 4 ("Distinctions of race and gender serve as obvious bases for categorization and therefore are prominent among people's social identities.")

116. See *supra* Part III.A.1.a.

117. See APPIAH & GUTMANN, *supra* note 41, at 87.

118. *Id.*

119. Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 877 (1993).

120. See, e.g., *id.*

121. See LITTLE HOOVER COMM'N, COMM'N ON CAL. STATE GOV'T ORG. AND ECON., WE THE PEOPLE: HELPING NEWCOMERS BECOME CALIFORNIANS 27-36 (June 2002).

122. See generally ROBERT S. CHANG, DISORIENTED: ASIAN AMERICANS, LAW, AND THE NATION-STATE 2-6 (1999) (using an example of a Korean American person in his analysis of the label "Asian American").

Robert Chang argues that the label "Asian American" is ambiguous.¹²³ It can represent a relational or national identity or describe "one subject position."¹²⁴ Ultimately, Chang concludes that the term "Asian American" "conveys a sense of community, place, and cultural space, configured within and against the nation-form America."¹²⁵ In contradistinction, Eric Liu contends, "What's missing from Asian American culture is culture."¹²⁶ Whereas Chang argues that the term "Asian American" includes a cultural component, Liu asserts that it presently does not. The two positions are not irreconcilable, however. According to Liu, the label should not be celebrated; rather, "[i]t is more meaningful . . . to celebrate Korean or Vietnamese or Chinese heritage—something with an identifiable cultural core."¹²⁷ In essence, the ethnic cultural component of the label "Asian American"—"Asian"—is the source of its meaning according to both scholars. Liu expounds:

An ethnic identity like "Chinese" matters because it is a medium of cultural continuity and meaning. "Chineseness," to be sure, is not an easy thing to delineate. It is a simplified marker for a complex reality. But the fact is that when I speak of my heritage—or when I speak of losing my heritage—I am referring to sounds and stories and customs that are *Chinese American*.¹²⁸

This position is consistent with the definition and understanding of culture employed in this Comment. Korean Americans generally understand who they are in relation to their ethnicity and culture. In other words, their ethnic culture is retained even when the new culture is adopted.¹²⁹ Moreover, Korean American gangs in particular celebrate their ethnic culture. Indeed, Boxer states that respect was the "life blood" of the

123. See *id.* at 2; see also ANCHETA, *supra* note 9, at 129. Ancheta elaborates:

Both "Asian" and "Pacific Islander" are imprecise terms. Does "Asian" describe a geographical category or a biological/appearance-based category? If it is geographical, where does Asia begin and end? Which islands are the islands of the Pacific? Physical appearance operates along a continuum, but there are noticeable differences among groups.

ANCHETA, *supra* note 9, at 129. Ancheta argues that the label "Asian American" is a "product of racialization." *Id.* at 128.

124. CHANG, *supra* note 122, at 2.

125. *Id.* at 5.

126. LIU, *supra* note 42, at 79.

127. *Id.* at 80.

128. *Id.* at 64.

129. See Hazel Rose Markus & Leah R. Lin, *Conflictways: Cultural Diversity in the Meanings and Practices of Conflict*, in CULTURAL DIVIDES, *supra* note 37, at 316 ("[M]any contemporary Asian Americans are constructing complex identities that embrace some aspects of American traditions of individualism while still retaining many interdependent meanings and practices."); THOMAS SOWELL, ETHNIC AMERICA 179 (1983); see also GORDON, *supra* note 18, at 117-18. According to Gordon:

From the cradle in the sectarian hospital to the child's play group, to the social clique in high school . . . the marriage partner, the neighborhood of residence, the church affiliation and the church clubs . . . the rest home for the elderly . . . in all of these activities and relationships which are close to the core of personality and selfhood—the member of the ethnic group may, if he wishes, and will in fact in many cases, follow a path which never takes him across the boundaries of his ethnic subsocietal network.

GORDON, *supra* note 18, at 117-18.

gang.¹³⁰ it influenced every spoken word and every action. While I offered support for this proposition previously, another anecdote may help to clarify how strong respect is as an influential variable within Korean American gangs.

Boxer told me of one particular night when he and a group of younger brothers within the gang were drinking at a Korean cafe. At the other end of the cafe sat an elder. At the end of the night, that elder paid for all the drinks that Boxer and his younger brothers consumed. Boxer and several, but not all, members of his party came over to thank the elder, bowing and expressing gratitude for his act of largess. As they were leaving, they heard the elder yell at them, ordering them to come outside and line up. When Boxer and all his younger brothers had lined up as directed, this elder went down the line and one by one hit each person in the face. He broke several noses and left others with swollen, bloody lips. He beat them because only some, and not all, the youths came over to thank him.¹³¹ As this piece of anecdotal evidence, as well as arguments I previously proffered, suggests, ethnic Korean culture, not a distinct Korean American culture, influences behavioral expression. The *degree* to which respect is emphasized within the Korean American gang is what qualifies “respect” as a uniquely Korean cultural concept.

D. *Zeitgeist as Culture*

One may argue that the *Zeitgeist*—the societal or subsocietal “culture”—influences Korean American gangbanger behavior, not ethnic Korean culture. According to this argument, a *Zeitgeist* is not necessarily derived from ethnicity, but is created.¹³² Examples are plethora. Scholars have lamented about the culture of prejudice,¹³³ which, for example, manifested itself via the Japanese internment during World War II.¹³⁴ The street culture,¹³⁵ as another example, influences youth to dress, speak, and move in a particular way in order to survive.¹³⁶ This definition of culture is extremely broad and is inconsistent with the definition employed in this Comment. Treating the foregoing as valid examples of culture would be nonsensical given this foundational divergence.

The two definitions may be summed up in the following way: culture is either derived from ethnicity or it isn't. The divergence between the two

130. See Interview, *supra* note 70, at question 32.

131. See *id.* at question 17.

132. See DRAGAN MILOVANOVIC & KATHERYN K. RUSSELL, PETIT APARTHEID IN THE U.S. CRIMINAL JUSTICE SYSTEM: THE DARK FIGURE OF RACISM 57 (2001); MIKE PRESDEE, CULTURAL CRIMINOLOGY AND THE CARNIVAL OF CRIME 5 (2000).

133. See SIMPSON & YINGER, *supra* note 59, at 97.

134. See Cole, *supra* note 51, at 993.

135. See generally PRESDEE, *supra* note 132, at 138-41 (arguing that “the street” has become a forum for social protest); see also GORDON, *supra* note 18, at 97 (referring to “urban culture”).

136. See Dennis Chong, *Values Versus Interests in the Explanation of Social Conflict*, 144 U. PA. L. REV. 2079, 2084-85, 2096-98 (1996).

definitions is illustrated in attempting to isolate culture by controlling for the Zeitgeist. “Cultural practices...tend to persist even after the environmental constraints that gave rise to them no longer exist.”¹³⁷ Therefore, to distinguish the ethnic cultural influence from the influence of Zeitgeist, Korean American gangs should be examined over a period of time—a period of time where one Zeitgeist has vanished and another materialized. The two may also be distinguished if there has never been a Zeitgeist where Korean cultural values were reflected. For example, was there a Zeitgeist of respect in the early 1990s? If not, then the emphasis on respect in Korean American gangs cannot be the result of Zeitgeist, but a different factor.

IV. THE GANG SUBCULTURE

In addition to culture, subculture may influence Korean American gangbangers.¹³⁸ A subculture is a “sub-division of a large culture area, distinguished by the comparative completeness of the development of a particular culture trait, or the comparative readiness with which such a trait will be diffused.”¹³⁹ Culture, therefore, subsumes subculture. The

137. *Id.* at 2085.

138. Criminality is a controversial aspect of the gang subculture. See HOWARD JONES, CRIME, RACE AND CULTURE: A STUDY IN A DEVELOPING COUNTRY 143-44 (1981) (“There is possible support here for the existence of a criminal subculture among African respondents, though it would be difficult to justify such a conclusion about the East Indians.”); PRESDEE, *supra* note 132, at 6-7 (“It is here somewhere in the process of culture formation and identity formation that the criminalisation process itself begins.”); SHELDEN ET AL., *supra* note 9, at 80 (referring to the “legendary Triad subculture”); SPERGEL, *supra* note 6, at 140 (“Chin emphasizes that Chinese gangs are different from Italian, black, and Hispanic crime groups, mainly because of the influence of the values and norms of the traditional criminal subculture of the Triad associations or traditional adult criminal societies.”); Wray Herbert, *The Fate of Racism—A New Debate: How Much Does It Hold Blacks Back? Is It Fading Away?*, U.S. NEWS & WORLD REPORT, Sept. 18, 1995, at 11-12 (reporting that some social critics believe that there exists both a “dominant black culture of hard work, family solidarity, middle-class dreams, church and biblical values” and a Black culture of “dysfunctionality”); Sampson & Lauritsen, *supra* note 18, at 331 (referring to the “subculture of violence” to explain variations in crime). Defining what is criminal is an ancillary issue implicated in the analysis. See PRESDEE, *supra* note 132, at 8, 17, 19, 24, 133-34, 139 (arguing that “the powerful” members in society define what is criminal); see generally JONES, *supra*, at 5 (explaining the theoretical grounding of the majority-minority disconnect with respect to what is or is not criminal and presenting criticisms of this viewpoint); see also Herbert, *supra*, at 12 (emphasizing the importance of “mainstream manners, character, comportment—what Loury collectively calls ‘deservingness’”). Whether criminality is inherent in a person’s ethnicity and culture or is based on a non-ethnic or non-cultural component of subculture is considered a taboo question not within the ambit of this Comment. See Yen, *supra* note 5, at 8. This question is taboo because when one argues that particular racial minorities are likely to commit particular crimes, the seemingly immediate assumption by either debater is that one’s racial composition or culture compels him or her to commit crime. See, e.g., *United States v. Weaver*, 966 F.2d 391, 394n.2 (8th Cir. 1992) (“Large groups of our citizens should not be regarded by law enforcement officers as presumptively criminal based upon their race.”), *cert. denied*, 506 U.S. 1040 (1992); Frank Rudy Cooper, *The Un-balanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 870-76 (2002). This inductive inference, however plausible, cannot ipso facto be considered the only assumption when variable X, Y, and Z may support the foregoing argument. See, e.g., KENNEDY, *supra* note 55, at 7-10; MacDonald, *supra* note 80, at M3. This Comment’s analysis of subculture regards its influence, or not, on behavior, which may be profiled. Criminality, however, is behavior that should be profiled.

139. DICTIONARY OF SOCIOLOGY 83 (Henry Pratt Fairchild ed., 1944).

question, however, is whether the subculture reflects culture per se or transforms or adds to it in a unique way. That gangs “construct shared styles and rituals that promote a larger sense of collective identity and expanded cultural meaning”¹⁴⁰ therefore begs the question.

As a threshold matter, “[o]ne may speak of the subculture of a gang.”¹⁴¹ This assumes correctly that “categorization can occur at multiple levels simultaneously, such that individuals can categorize themselves both as members of distinct ethnic groups and as members of the superordinate group.”¹⁴² Indeed, “group identity is stronger among members of subordinate groups than among members of dominant groups.”¹⁴³ Therefore, gangs not only possess a subculture, but they are influenced by it.

What, then, comprises a gang subculture? According to several scholars:

An important part of the gang subculture, as with other subcultures, is the belief and value system. There appear to be several core beliefs and values that tend to be most important in the lives of gang members. These include honor, respect, pride (in oneself and in one’s neighborhood), reputation, recognition, and self esteem. The respected gang member is often one who displays very noteworthy qualities, such as having courage, heart, and loyalty.¹⁴⁴

How, then, can we determine whether the subculture reflects culture or transforms it? It is important to note, initially, that even when a subculture transforms culture, it still reflects culture. In other words, the specific question is *how much* the subculture transforms culture, for there will always be overlap between the two. Using respect as an example, as it is both an ethnic Korean value as well as a gang subcultural value, the question becomes: to what extent is the emphasis on respect within Korean American gangs a result of Korean culture per se?

As the discussion so far makes clear, we know Korean culture plays a role, because culture subsumes subculture. That culture is implicated may be enough of a nexus to satisfy some. For those who are not satisfied, an alternative explication is available: Korean American gangbangers express ethnic Korean cultural *characteristics*, which indicates that culture survives

140. MILOVANOVIC & RUSSELL, *supra* note 132, at 62.

141. GORDON, *supra* note 18, at 122; *see also* KO-LIN CHIN, CHINATOWN GANGS: EXTORTION, ENTERPRISE, AND ETHNICITY 121 (1996) (“According to subcultural theorists, a gang represents a subcultural group with its own norms and values.”).

142. Prentice & Miller, *supra* note 59, at 5; *see also* David O. Sears et al., *Cultural Diversity and Multicultural Politics: Is Ethnic Balkanization Psychologically Inevitable?*, in CULTURAL DIVIDES, *supra* note 37, at 40 (“Indeed, people can have multiple group identities, given the existence of different levels of self-representation.”).

143. Patricia Gurin et al., *Context, Identity, and Intergroup Relations*, in CULTURAL DIVIDES, *supra* note 37, at 149.

144. SHELDEN ET AL., *supra* note 9, at 108; *see also* CHIN, *supra* note 141, at 121 (listing several norms and rules of a Chinese gang, which include “[d]o not betray your gang,” “[l]isten to the *dai lo* and follow his instructions carefully,” and “[r]espect the *ah kungs*”).

subcultural filtration. Respect is a broad term, and it can be manifested physically in many ways. While respect is both a cultural characteristic and a value highly regarded by gangs—and therefore difficult to isolate—bowing, posturing, and customary drinking are not. Korean culture, then, is expressed in the subculture through distinctively Korean activities, not through what we consider traditional “gang” activities, such as hand signs or “tagging.” The fact that these cultural actions are undertaken by Korean American gangs in furtherance of a Korean cultural trait—that is, the degree to which respect manifests itself in gang activity—supports the contention that ethnic culture is not substantially diluted or transformed by the existence of a subcultural entity.

It is important to remember that cultural and subcultural conceptions overlap, however. For example, respect is both a Korean cultural value and an urban-gang subcultural requisite.¹⁴⁵ Milton Gordon provides another example:

For instance, the son of lower-class Italian immigrants, growing up in New York’s upper East Side, is not a person who is simultaneously affected by separable items consisting of ethnic background, low-economic status, and a highly urbanized residential situation. He is a person whose environmental background is an interwoven and variegated combination of all these factors. Each of the elements has been somewhat transformed by virtue of its combination with the others.¹⁴⁶

Yet another example involves Vietnamese gang culture, which manifests an amalgamation of traditional cultural values, Western ideas, and immigrant exigencies.¹⁴⁷ Scholars, undertaking a deductive analysis, should be cognizant of this methodological issue. One way to address it, however, may be to examine distinctively cultural characteristics or the degree to which gangbangers exhibit cultural characteristics within their subculture.

V. CONSTITUTIONAL ANALYSIS

A. *The Equal Protection Analysis*

Would profiling culture violate the Equal Protection Clause of the Fourteenth Amendment? To answer this question, we must first present the doctrine. According to Section One of the Fourteenth Amendment to the U.S. Constitution, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

145. See Chong, *supra* note 136, at 2096-98. Additionally, Chinese American gangs have a distinctive culture comprising an amalgamation “of traits borrowed from the Hong Kong triads (secret criminal societies) and the clichés of American and Chinese gangster movies.” See Mayer, *supra* note 21, at 963.

146. GORDON, *supra* note 18, at 99.

147. See Karen Robinson, Book Note, *Trouble in the Promised Land*, 23 AM. J. CRIM. L. 683, 683-84 (1996) (reviewing PATRICK DU PHUOC LONG, *THE DREAM SHATTERED: VIETNAMESE GANGS IN AMERICA* (1995)).

of the State wherein they reside. No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁴⁸

Under the Equal Protection Clause, a facial racial or national origin classificatory law is subject to strict scrutiny.¹⁴⁹ Where strict scrutiny is invoked, the classification will be upheld only if it bears a necessary relation to a compelling governmental purpose.¹⁵⁰ A facially neutral race or national origin classification, however, is only subject to strict scrutiny if purposeful discrimination is demonstrated.¹⁵¹ The purposeful discrimination requirement is satisfied by establishing causation: the classification must be "because of" a desire to create a discriminatory impact, not simply "in spite of" the probability of a discriminatory impact.¹⁵² There are several ways to prove causation and, by extension, purposeful discrimination.¹⁵³ First, "the impact of a law may be so clearly discriminatory as to allow no other explanation than that it was adopted for impermissible purposes."¹⁵⁴ Second, discriminatory purpose may be shown "through the history surrounding the government's action."¹⁵⁵ "A third way of proving discriminatory purpose is through the legislative or administrative history of a law."¹⁵⁶

Let us assume that culture is a suspect classification, which is likely a safe assumption because culture can and does subsume race; that is, culture is both like race and arguably manifests race's apogee. Before one can scrutinize a particular classification, however, one must show purposeful discrimination. Since that is difficult to satisfy, several scholars have argued that unconscious racism ought to suffice.¹⁵⁷ According to this school of thought, "Tacit understandings instill stereotypes in ways that escape conscious detection, causing us to traverse the channels largely unconsciously."¹⁵⁸

The unconscious racism argument does not, and should not, satisfy the discriminatory purpose requirement. First, it is simply inconsistent with

148. U.S. CONST. amend. XIV.

149. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235 (1995); *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

150. See *Adarand Constructors, Inc.*, 515 U.S. at 235.

151. See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

152. See *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

153. See *Arlington Heights v. Metro. Hous. Corp.*, 429 U.S. 252, 266-68 (1977).

154. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICES* 687 (2d ed. 2002); see also *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (stating that over 200 petitions by ethnically Chinese individuals were denied in contradistinction to only one petition by a non-Chinese individual); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (explaining that the government, in its attempt to redraw the city's boundaries, transformed a square shape boundary into a twenty-eight-sided figure, which resulted in the placement of only four or five of the 400 African Americans in the city within the boundary).

155. CHERMERINSKY, *supra* note 154, at 688.

156. *Id.* at 689.

157. See, e.g., JODY DAVID ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 73-77 (1997).

158. *Id.* at 75.

legal notions of intent. Under the common law, intent may be established either by demonstrating subjective desire or knowledge with substantial certainty.¹⁵⁹ The term “unconscious,” ipso facto, translates into “unintentional.” Syllogistically, the “unconscious racist” neither subjectively desires to discriminate nor possesses knowledge with substantial certainty—or any certainty for that matter—that his or her action is discriminatory. Holding such a person liable in this way seems fundamentally unfair.

Furthermore, the argument that unconscious racism constitutes purposeful discrimination is based on a belief that society en masse is discriminatory. According to this argument, society has conditioned us, and we have developed “tacit understandings” (i.e., stereotypes held unconsciously) about members of other racial groups.¹⁶⁰ For example, “although local and national news anchors do not openly announce that Blacks are ‘prone to violence’ on the nightly news, the relentless and selective representation of Black violence in the mass media tacitly transmits the same message.”¹⁶¹ The fact that media report crimes committed by African Americans suggests that the reporters are unconsciously biased, and their constant reporting of such crime instills and solidifies within us tacit understandings. As to the first point, the fact that media report crimes committed by African Americans may or may not support the argument that the reporters are unconsciously biased. Perhaps police simply go where the crime is,¹⁶² and, because crime is generally newsworthy, it is reported. Assuming unconscious discrimination after every action or inaction commits the fallacy of induction.

This assumption depends upon a third unspoken premise—that large statistical differences between groups do not usually arise and persist without discrimination. For if they do, then discrimination takes its place as only one cause among many—and inferences from statistical disparities lose their validity as evidence. Discrimination may still exist and be harmful, but the convenient statistical barometer would be lost. Even a disease that is fatal 10 percent of the time provides no automatic explanation of death if there are many other fatal diseases, along with accidents, murder, and suicide. These are the inherent pitfalls of inductive reasoning. Even if A is known to cause Z, we still cannot infer A whenever we find Z, if B, C, D, etc., also cause Z.¹⁶³

159. See JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 28-29 (5th ed. 1999).

160. See ARMOUR, *supra* note 157, at 75.

161. *Id.*

162. See MacDonald, *supra* note 80, at M3 (“It is not racism that sends [police officers] there; it is the incidence of crime.”).

163. SOWELL, *supra* note 61, at 17; see also THOMAS SOWELL, *THE QUEST FOR COSMIC JUSTICE* 33-34 (1999) (“[S]tatistical disparities between the achievements . . . are often regarded as proof of . . . discrimination . . . Yet similar—and even larger—disparities . . . can be found among groups in other countries with entirely different histories, lacking the very factors that are assumed to underlie black-white differences in the United States.”).

The second point of the argument is problematic, too. Scholars argue that individuals are unconsciously racist by virtue of their membership in a society where discriminatory beliefs are explicitly and implicitly propagated. Individuals, then, had no choice in becoming racist. Holding individuals liable for something over which they had no control whatsoever is simply unprecedented in American jurisprudence.¹⁶⁴

Perhaps an example will help clarify the point. Under the criminal law, an epileptic person can still be held to have committed a crime if he or she suffers a seizure while driving and crashes into another car, killing its passenger, for the act of getting into the car with knowledge of his or her condition is sufficient to satisfy the "actus reas" element of the crime. In other words, the person *chose* to drive, with knowledge that he or she may suffer a seizure and cause an accident. One could argue that we choose to watch television and listen to the media report on crimes committed by African Americans, thereby choosing to risk exposure to cultural beliefs that may form tacit understandings. But these analogies seem strained. While technically there is a choice, functionally, practically, and realistically, there isn't. Do children choose to have an education, thereby risking exposure to beliefs that may form unconscious bias? To call this a "choice" that is sufficient for constitutional purposes is simply nonsensical. Hence, the reasonable conclusion seems to be that there is no analogous "choice" in our case. The lack of choice seems to be determinative, for without the existence of voluntariness, the legal liability attaching to the consequences of one's actions almost certainly changes.

But even assuming society is *generally* discriminatory and not completely unconsciously biased, holding an individual liable for a group belief or phenomenon commits the fallacy of division; in essence, the individual is held vicariously liable for the beliefs of the whole.¹⁶⁵ Moreover, the unconscious racism argument, in this particular form, is over-inclusive, as it applies to individuals who may not, in fact, be unconscious racists.¹⁶⁶

Additionally, applying the concept of unconscious discrimination is simply inadministerable, unless its proponents' argument is that everybody is an unconscious racist. The previous argument, however, illustrates that that position is untenable. With respect to inadministerability, how can the law determine who is and who is not unconsciously discriminating? When does obliviousness—that is, a state of non-racist unconsciousness—transform into unconscious racism? This sort of analysis is difficult at best,

164. But in tort law, under the doctrine of respondeat superior, employers are held liable for the acts of their employees. See HENDERSON ET AL., *supra* note 159, at 149-59. Therefore, one may argue, there is precedent for application of the unconscious racism argument. This analogy, however, is untenable. Unlike a respondeat superior case, where the employer freely chooses to hire the employee, there is no analogous choice in the unconscious racism case. The choice, if there is one, could only be the individual's parents' decision to conceive a child into a world where racism exists.

165. See PATRICK SHAW, *LOGIC AND ITS LIMITS* 129 (2d ed. 1997).

166. See CHEMERINSKY, *supra* note 154, at 647.

for it requires someone telling someone else what he or she *really* thinks, and it also requires the ability to know *how* to discern this.

For purposes of intellectual curiosity, this Comment will assume that discriminatory purpose has been satisfied. Therefore, what follows is a plausible rendition of how the subsequent argumentation may proceed.

1. *Compelling interest*

The interest in deterring gang-related incidents and crime by culturally profiling is compelling. Indeed, David Cole states, “There is no question that protecting citizens from terrorism is a compelling government interest, but so too is drug interdiction—in fact, all criminal law enforcement would likely be viewed as a compelling state interest.”¹⁶⁷ Certainly, we can draw analogies between terrorism and gang activity:¹⁶⁸ both involve an organized group whose purpose is to commit crimes in furtherance of an objective. Criminal enforcement, deterrence, and prevention, however, are sufficient as compelling *per se*. The crux of this analysis, therefore, concerns the fit.

2. *Narrowly tailored*

The issue is whether the government’s classification is necessary—the least restrictive alternative—to achieve its interest. Specifically, the issue is whether cultural profiling by the Los Angeles Police Department, for example, is necessary to achieve the end of criminal enforcement, deterrence, and prevention.

Theoretically, the analytical puzzles that arise in the racial-profiling/equal-protection analysis arise, too, in the context of cultural profiling. This may come as little surprise. The following premise underlies both racial and cultural profiling: it may or may not be proper to generalize based on a particular attribute. The existence of generalizations immediately conjure under- and over-inclusive arguments. And “[i]n evaluating the relationship of the means of the particular law to the end, the Supreme Court often focuses on the degree to which a law is underinclusive and/or overinclusive.”¹⁶⁹

In that vein, with respect to profiling Arabs and Muslims after September 11, David Cole argues, “[T]he vast majority of persons who appear Arab and Muslim—probably well over 99.0 percent—have no involvement with terrorism. Arab and Muslim appearance, in other words, is a terribly inaccurate proxy.”¹⁷⁰ In short, the classification is over-inclusive. Analogously, the majority of Korean Americans who culturally express themselves “suspiciously” are overwhelmingly not gangbangers. All Koreans and the vast majority of Korean Americans bow to their elders and practice customs, including drinking customs, for example.

167. Cole, *supra* note 51, at 976.

168. See *supra* Part I.

169. CHEMERINSKY, *supra* note 154, at 647 (citation omitted).

170. Cole, *supra* note 51, at 976.

Likewise, the classification may be under-inclusive. By targeting only individuals who express particular cultural values, law enforcement may not capture bonafide gangbangers. "When one treats a whole group of people as presumptively suspicious, it means that agents are more likely to miss dangerous persons who do not fit the profile, such as Richard Reid, the British citizen who boarded a plane in Paris headed for Miami with a bomb in his shoe."¹⁷¹ Like the Richard Reid example, there may be fifth-generation Korean Americans who do not express "suspicious" cultural behavior, but are gang affiliated. Boxer knows someone named "Chino," who is a Korean American, but was a member of a Tongan Crip gang. He did not practice Korean cultural customs; nor did he bow to his elders. In fact, he dressed and acted like an African American gangbanger. There is no doubt that Chino, a Korean American male, was a gangbanger, yet he did not express cultural behavior typically associated with Korean American gangbangers.

In addition, an assessment of "fit"—whether a particular law is the least restrictive means—may include an examination of the ramifications or likely consequences of the classification (i.e., policy). What, then, are the ramifications or likely consequences of cultural profiling or precluding cultural profiling? The literature has focused extensively on the costs of profiling.¹⁷² This Comment will assess the ramifications of *precluding* profiling as a method of evaluating fit. Cost, then, is not only positive, but negative. Jody Armour acknowledged this point in a related, but different context:

For the use of statistical generalizations entail significant social costs, notwithstanding obvious benefits to defendants. The fatal flaw in the Bayesian's argument lies in his failure to take account of the costs of acting on his racial generalizations. Instead, he assumes that the rationality of his factual judgments is all that matters in assessing the reasonableness of his reactions.¹⁷³

Armour argues that the costs of acting based on one's generalizations should be considered. For example, a taxicab driver should consider the costs of acting on his or her belief that certain persons are dangerous to pick up. Acting on his or her belief may cause the passed-over individual to feel marginalized and angry, and can lead to wider societal problems.

One should also consider the costs of not acting on one's generalizations, however, for generalizations often contain truths. Consider the following: racial categories are not classical categories; that is, all members of the category "Korean" do not seem to share any one thing in common. Some Koreans have lighter hair, some have rounder eyes. The category "Korean" is not like the category "triangle," in which all members share certain things in common, namely, three sides, and angles that add up

171. *Id.* (citation omitted).

172. See, e.g., KENNEDY, *supra* note 55, at 151-59.

173. ARMOUR, *supra* note 157, at 46-47.

to 180 degrees. This produces a problem for generalizations, for with racial categories, no generalization will be perfect. But generalizations are not based on one's subjective beliefs alone; they are ordinarily based on empirical evidence and, therefore, contain truths. The fact that "Asians" is not a classicial category is not reason enough to conclude that generalizations *in toto* are useless. In fact, it is still a category—one that philosophers call "radial categories." In sum, generalizations are not necessarily bad things; they often contain truths.¹⁷⁴ Therefore, one should reasonably consider the costs of not acting on a generalization.

The "costs of achieving justice matter"; that is, "justice at all costs' is not justice."¹⁷⁵ Concretely, society may secure justice for Korean Americans who are not gangbangers by disallowing profiling, but the cost of not profiling may be high. Heather MacDonald quips: "Would cop bashers prefer that officers investigating a murder on Western Avenue [in South Central] go to Brentwood for the sake of racial balance? ... [I]f critics keep accusing officers of bigotry for trying in good faith to do their jobs, it will be all the harder for them to fight crime."¹⁷⁶ The costs are evident. Bonafide criminals may escape detection and detention, police officers may proceed inefficiently or disgruntled, or both, and innocent people may suffer as a result.

If cultural profiling were to occur, doubtless some innocent Korean Americans would be profiled for cultural expression because gangbangers possess or exhibit those cultural characteristics.

On the other hand, eliminating profiling may cause both non-Korean American and Korean American innocents to suffer just as much, if not more. Why? Consider the evidence. Korean American gang activity affects the Korean American community specifically and directly, for, perhaps paradoxically, Korean American gang activity targets Korean Americans.¹⁷⁷ This occurs for one primary reason: Korean American gangbangers understand Korean culture. And based on this understanding, they take as a given that Korean American victims generally under-report crimes committed against them,¹⁷⁸ thereby leading to continued

174. We should, however, be ever vigilant against basing generalizations on incorrect information or distorted subjective beliefs.

175. SOWELL, *supra* note 163, at 28.

176. MacDonald, *supra* note 80, at M3.

177. See, e.g., URBAN STREET GANG ENFORCEMENT, *supra* note 3, at 51 ("Victims are likely to be members of the Asian Community who often do not report crimes because of intimidation, a culturally based distrust of law enforcement, or an acceptance of some forms of victimization.").

178. See, e.g., Yen, *supra* note 5, at 16 (maintaining that Asian Americans receive "less attention from law enforcement officers at all stages of the criminal arrest, investigation, and pre-trial processes," and that Asian American victims "fail to assert their grievances," and, as a result, "police likely make fewer arrests for Asian and Asian American victims as compared to white victims"); Note, *supra* note 59, at 1930 (stating that Asian Americans report crimes less often, probably as a result of "language barriers, cultural norms, ignorance of the American legal system, mistrust of the police from adverse experiences in the United States or in their country of origin, or general skepticism about the efficacy of legal recourse").

victimization and the perpetuation of mental and physical violence.

The fact that Asian American victims under-report crimes is well supported. Recently, the U.S. Department of Justice found that among all the major ethnic or racial groups in the United States, Asian Americans are the least likely to report violent crimes committed against them.¹⁷⁹

Korean Americans generally under-report crimes for at least five reasons. First, they may fear “retaliation from the gang if they report the crime or cooperate with the police.”¹⁸⁰ Second, they may fear negative publicity, which could bring “shame” to the Korean American community.¹⁸¹ Earlier-generation Korean Americans, especially, have been, according to one source, socially conditioned to avoid actions that bring shame to the community and to themselves for having been a victim.¹⁸² Third, illegal immigrants may fear deportation when, in the course of responding to a report that a gang-related crime has occurred, authorities discover that the victim is in the United States illegally. Fourth, recent immigrant families may have arrived from countries where the police were viewed as corrupt, and therefore, reporting is seen as futile.¹⁸³ And last, “linguistic barriers between victims and police and the lack of bilingual law enforcement personnel” may cause Korean Americans, and especially recent immigrants, to forgo contacting the police.¹⁸⁴

The upshot is that no perfect system does or ever will exist. Reality is that there always will exist occurrences where innocent men and women take umbrage to actions taken by the police.¹⁸⁵ Simply put, the objective of the movement against profiling, which seeks to eliminate the pulling over of innocents entirely,¹⁸⁶ is unattainable.

Even though “[p]romoting and maintaining one’s own ethnic culture—a fundamental premise of pluralism—is . . . consistent with constitutional principles,”¹⁸⁷ policy may serve as a counterweight on the scale of constitutional considerations, especially when that policy

179. See TIMOTHY C. HART, U.S. DEP’T OF JUSTICE, REPORTING CRIME TO THE POLICE, 1992-2001 (2003).

180. *AALAM Members Discuss Asian Gangs in Massachusetts*, AALAM NEWS (Asian Am. Lawyers Ass’n, Mass.), Mar. 2003, available at <http://www.aalam.org/news/march2003.pdf> (last visited Mar. 9, 2004).

181. ASIAN-NATION, ASIAN AMERICAN GANGS, available at <http://www.asian-nation.org/gangs.shtml> (last visited Mar. 9, 2004).

182. *Id.*; see also Terri Yuh-lin Chen, Comment, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69, 76 (2000).

183. *Id.*

184. Chen, *supra* note 182, at 75.

185. See *United States v. Sokolow*, 490 U.S. 1, 13 (1989) (“Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work of subjecting innocent individuals to unwarranted police harassment and detention.”).

186. See, e.g., MILOVANOVIC & RUSSELL, *supra* note 132, at 41.

187. Hing, *supra* note 119, at 880 (“One of the strengths of cultural pluralism is its connection to constitutional principles. . . . We pride ourselves in maintaining and exercising these constitutional rights, and they are a major reason so many people seek U.S. residency and citizenship.”); cf. Ronald R. Garet, *Communitality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1024 (1983) (“[T]he individual value behind equal protection is ‘equal respect for persons.’”).

consideration serves as a means toward the very end of promoting and maintaining harmony within the Korean American community. In fact, this policy consideration calls into question the compelling interest used to combat racial profiling because profiling actually considers the fact that Korean American gangbangers' activity takes place in, and harms, the Korean American community. In essence, jurists' desire to promote ethnic culture in the abstract might in practice harm the very people they seek to help.¹⁸⁸

In sum, courts should take into consideration the costs of not profiling in any case where profiling is challenged under the Equal Protection Clause. The considerations of not profiling include assessments of the potential consequences of holding otherwise. In the particular context of Korean American gangbangers, the costs of not profiling are especially acute, given the fact that Korean American gangbangers generally perpetrate crimes against the Korean American community, and the Korean American victims tend to under-report crimes committed against them. Justice requires taking into consideration the practical consequences of adopting a particular ruling in pursuit of justice itself.

B. The Fourth Amendment Racial-Profiling Cases

The U.S. Supreme Court and the Ninth Circuit Court of Appeals have decided several important racial-profiling cases. The first of these cases is *United States v. Brignoni-Ponce*.¹⁸⁹ In this case, two border patrol agents, parked near a checkpoint, observed passing cars, illuminating them with their patrol car's headlights. They pursued respondent's car, stopped it, and questioned the driver and the two passengers. Their only reason for doing so was the respondent and passengers' Mexican appearance. They discovered that the passengers had entered the country illegally. All three were arrested, and the driver was charged with knowingly transporting illegal immigrants under federal law. At trial, the driver sought to suppress testimony regarding the two passengers, arguing that the evidence was the result of an illegal seizure.¹⁹⁰

The Court held that the stop was not reasonable based primarily on two factors. First, the reasonableness requirement of the Fourth Amendment, the Court stated, "demands something more than the broad

188. An important question not addressed in this Comment is whether group rights is a determinative variable and whether it should influence the outcome of the equal protection analysis. For a thoughtful examination of this issue, see Ronald R. Garet, *Dancing to Music: An Interpretation of Mutuality*, 80 KY. L.J. 893, 901 (1991-92). According to Garet, "groupness, like individuality or personhood, is a structuring element of human existence." *Id.* at 904; see also ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGE IN LIBERAL DEMOCRACIES (Richard Shweder et al. eds., 2002) (exploring how liberal democracies respond legally to differences in the cultural practices of their minority groups); Garet, *supra* note 188, at 1066 ("My proposal is that communality or groupness is a necessary structure of existence.").

189. 422 U.S. 873 (1975).

190. *Id.* at 874-75.

and unlimited discretion sought by the Government.”¹⁹¹ The only limitation on discretion was a distance requirement that “limited” the officers’ jurisdiction to the area within “100 air miles of the 2,000-mile border.”¹⁹² Given this broad and effectively unlimited discretion, a large number of legitimate traffic would be subject to “unlimited interference,” as the roads near the checkpoint were used by persons seeking to enter the United States illegally, as well as law-abiding residents.¹⁹³ Legitimate law enforcement needs, in other words, do not require this degree of interference with lawful traffic.

Second, the Court held that the Fourth Amendment did not allow the stop when the occupants’ apparent Mexican ancestry provided the only ground for suspicion.¹⁹⁴ Officers relied on a single factor: apparent Mexican ancestry. The Court concluded that this alone would not justify a reasonable belief that the car’s occupants were aliens.¹⁹⁵

Brignoni-Ponce indicated the degree to which the Court frowned on the use of ethnicity and race in the context of a reasonable suspicion analysis. The Ninth Circuit in *United States v. Montero-Camargo* followed the Supreme Court’s lead.¹⁹⁶ In this case, the court held that the district court inappropriately considered the defendants’ Hispanic appearance in determining whether border patrol agents had reasonable suspicion to stop them.¹⁹⁷ The court emphasized that “reasonable suspicion requires *particularized* suspicion.”¹⁹⁸ The court continued, “Where, as here, the majority (or any substantial number) of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis.”¹⁹⁹ In short, the court concluded that one’s ethnic or racial appearance is not sufficiently particular and, therefore, may not form the basis of a reasonable suspicion.

The Supreme Court, however, has found that, under certain circumstances, stops based on ethnic or racial appearance are appropriate. In *United States v. Martinez-Fuerte*,²⁰⁰ the Court held that it was constitutionally permissible for the border patrol, after routinely slowing or stopping cars at checkpoints, to refer cars selectively—on the basis of ethnic appearance or race—to a different inspection area for questioning.²⁰¹ The Court based its holding primarily on two conjunctive factors. First,

191. *Id.* at 882.

192. *Id.* at 883.

193. *Id.* at 882.

194. *Id.* at 885-87.

195. *Id.*

196. 208 F.3d 1122, 1134 (9th Cir. 2000) (noting that there have been “significant changes in the law restricting the use of race as a criterion in government decision-making,” and stating that the “use of race and ethnicity for such purposes has been severely limited”).

197. *Id.* at 1131.

198. *Id.*

199. *Id.*

200. 428 U.S. 543 (1976).

201. *Id.* at 556-57

requiring stops on major routes always to be based on reasonable suspicion would be impracticable because traffic was too heavy to allow particularized study.²⁰² Moreover, such stops are important, because in their absence, “such highways would offer illegal aliens a quick and safe route into the interior. Routine checkpoint inquiries apprehend many smugglers and illegal aliens”²⁰³ Second, the intrusion is limited: the stop involved only a brief detention of travelers during which a few brief questions are asked and certain documents are asked to be produced.²⁰⁴ Moreover, the Court stated that such stops “do not intrude similarly on the motoring public. . . . [T]he potential interference with legitimate traffic is minimal,” and “checkpoint operations both appear to and actually involve less discretionary enforcement activity.”²⁰⁵

Courts agree, however, that behavior may be considered as a factor establishing reasonable suspicion.²⁰⁶ In *Montero-Camargo*, for example, the court stated that eye contact may establish reasonable suspicion, but noted that “whether the contact is suspicious or not ‘is highly subjective and must be evaluated in light of the circumstances of each case.’”²⁰⁷ The court was skeptical of eye contact as an indicia of suspiciousness, however, because “reliance on ‘suspicious’ looks can so easily devolve into a case of damned if you do, equally damned if you don’t.”²⁰⁸ Consequently, the court found that eye contact is of “questionable value.”²⁰⁹

In *Brignoni-Ponce*, the Court was concerned first with “unlimited discretion” on the part of law enforcement, which could lead to “unlimited interference.” This concern was connected to the Court’s second holding: that one’s apparent ancestry cannot be the sole basis for reasonable suspicion. The Ninth Circuit emphasized the inappropriateness of profiling ethnic appearance in *Montero-Camargo*, holding that reasonable suspicion requires *particularized* suspicion.

As applied to a hypothetical case where law enforcement officials profile culture, *Brignoni-Ponce* and *Montero-Camargo* are distinguishable. First, Korean American gangbangers would not be profiled based solely on their apparent ancestry, but also on a cultural act. Moreover, the cultural act—whether bowing or respectful drinking customs—would be profiled, under the logic of this analysis, only inasmuch as it is performed excessively. Recall that, because respect is highly valued within Korean culture and Korean American gang subculture, gangmembers and gangbangers perform cultural acts more often and more obsequiously than the typical Korean American. Therefore, unlike *Brignoni-Ponce* and

202. *Id.*

203. *Id.* at 557.

204. *Id.* at 558.

205. *Id.* at 559.

206. *See, e.g.,* United States v. Montero-Camargo, 208 F.3d 1122, 1136 (9th Cir. 2000).

207. *Id.* (quoting United States v. Robert L., 874 F.2d 701, 703 (9th Cir. 1989)).

208. *Id.*

209. *Id.*

Montero-Camargo, law enforcement would profile particularized cultural acts and, as a result, the Korean American community at large would not be similarly interfered with.

Second, the fact that Korean American gangbangers target the Korean American community based on their understanding of culture, and how that culture influences Korean Americans' response to crime (or lack of response), may lend support for profiling culture. The harm is particularized, continuing, and is a result of Korean culture. For example, recall that one reason for under-reporting is a desire not to bring shame to one's community—a desire that has been cultivated culturally. Law enforcement may legitimately need to profile culture, then, as gangbangers use culture to victimize members of their community, and as culture constrains the community from responding actively against crimes committed against them. This unique situation is simply unlike the law enforcement needs present in either *Brignoni-Ponce* or *Montero-Camargo*.

Under this line of argumentation, the hypothetical is akin to *Martinez-Fuerte*. The Court upheld the use of checkpoints in that case because “the potential interference with legitimate traffic is minimal,” and “checkpoint operations both appear to and actually involve less discretionary enforcement activity.”²¹⁰ This language applies exactly: interference with non-gang-affiliated Korean Americans is minimal because they do not perform cultural acts with the frequency and rigor with which Korean American gangbangers do. Additionally, profiling culture is necessarily an “ethnicity plus” activity that constrains “discretionary enforcement activity.”

The Court's holding, however, was based on two conjunctive factors, the first concerning impracticability and cost. The impracticability analysis is inapposite with respect to profiling culture, for the Court's discussion involved a further inquiry by law enforcement based solely on apparent ethnic appearance. The cost of not stopping cars for inspection and inquiry, according to the Court, would be increased illegal immigration and an inability to apprehend smugglers and illegal aliens. This cost is strikingly similar to the cost in *Brignoni-Ponce*: deterring illegal entry and social problems caused by aliens.²¹¹ The fact that the costs in both cases were essentially identical, yet the courts arrived at opposite conclusions, suggests that the “intrusion” variable was determinative. Should a court not accept the argument based on the unique costs associated with Korean American gangs, then alternatively one could argue that the courts have more closely scrutinized the intrusion element. And here, the act of profiling particularized cultural acts constrains discretion and does not broadly interfere with the Korean American community.

210. *Martinez-Fuerte*, 428 U.S. at 559.

211. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79 (1975).

Lastly, as *Montero-Camargo* held, behavior—bowing, posturing, and drinking customs—may be considered in determining suspiciousness. Law enforcement can profile particularized cultural acts consistent with the Constitution, like the patrol officers considered eye contact (i.e., behavior). Unlike eye contact, however, bowing, posturing, and practicing drinking customs cannot “so easily devolve into a case of damned if you do, equally damned if you don’t.”²¹² In fact, this analysis isn’t really applicable. To see why this is so, consider the following counterargument: were law enforcement to adopt cultural profiling as a policing tool, Korean American gangbangers would simply change their behavior. Not bowing, then, would be just as suspicious as bowing; that is, we would be back within the *Montero-Camargo* framework.

This argument founders because it underestimates the influence of culture within the Korean American gang context. The degree to which respect is honored and manifested by Korean American gangbangers weighs against its evisceration in daily activities. Younger gangmembers would face an unhappy tension between not bowing (for example), and therefore increasing the probability of getting a beating, and bowing, which may lend support of gang affiliation to authorities. The elders in the gang might lay down a rule suspending all manifestations of respect, but its implementation would be haphazard; moreover, it is doubtful whether such a rule would even be promulgated, given the absolute premium Korean culture and Korean American gangs place on respect. In short, it is highly likely that Korean American gangmembers will continue performing cultural acts, including respectful acts, even if law enforcement adopted cultural profiling as a policing tool; therefore, not performing these acts should not be viewed as suspicious.

While these cases involve the Fourth Amendment, the kinds of arguments the courts employ in the context of racial profiling are illuminating for the Fourteenth Amendment. After all, the application of strict scrutiny involves an assessment of costs, which is similarly entailed in an assessment of reasonableness. Moreover, because the courts have analyzed racial profiling in the context of the Fourth Amendment, a case brought under the Fourteenth Amendment would likely invoke these cases. Therefore, the foregoing arguments cut through the formal doctrine and apply vigorously to the discussion *in toto*.

VI. CONCLUSION

Mayor Hahn and Chief Bratton are correct: the gang problem is insidious. I know from deep, personal conversations with close friends who used to gangbang the extent to which they regret their past, the pain they afflicted on their community, their families, and themselves. Particularly in Southern California, Korean American gangs flourish and,

212. *Montero-Camargo*, 208 F.3d at 1136.

as a result, the affliction they wreak on the community continues—and it looks as though it will continue in an increasingly violent way. When Boxer was a gangbanger, gangbangers from opposing gangs fought each other “toe-to-toe,” that is, through fist-fighting. Now, however, Korean American gangs use guns.

It is understandable that courts may be concerned about the implications of profiling, racial or cultural. The act of profiling opens the possibility of officers’ using incorrect or biased information or beliefs as the basis for a traffic stop, for example. The possibility for mistake is especially acute in the context of profiling Korean culture, for Korean cultural manifestations that may seem suspicious are, in fact, practiced ubiquitously among the Korean American population.

Courts, however, should also consider the unique costs of not profiling within an analysis of profiling’s constitutionality under the Fourteenth and Fourth Amendments. This analysis is simply the logical corollary of an assessment of costs. Furthermore, an analysis of several Fourth Amendment racial-profiling cases indicates that profiling culture would be constitutional, as culturally informed acts are particularized and, therefore, discretion is constrained, and profiling such acts does not broadly interfere with the Korean American community. Profiling Korean culture may actually help the community by deterring crime and apprehending Korean American gangbangers. In a time where profiling is considered suspect, its use just may, perhaps counterintuitively, contribute to justice.

